

The ethics of drug criminalization

[Narkotikakriminaliseringens etikk]

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Abstract

Is the criminalization of possession, use, and distribution of some drugs an ethically defensible policy? This text uses criminalization theory as a framework for assessing the legitimacy of the international regime of drug control. It performs an analytical review of the explicit and implicit arguments and assumptions that have been presented by philosophers in favor of or in opposition to the policy of drug criminalization and assesses the validity of these arguments and assumptions in light of current empirical research. On the basis of this assessment, the text analyzes the case for drug criminalization according to the five extant criminalization theories – legal moralism, legal paternalism, the Millian perspective based on harm to others, the Kantian perspective based on sovereignty, and the neo-Aristotelian aretaic perspective. It concludes that none of these criminalization theories can justify drug criminalization, and that both the Kantian and Millian theories appear to actively speak against it. Drug criminalization therefore appears to be an ethically indefensible policy.

Er kriminaliseringen av oppbevaring, bruk og salg av såkalte narkotiske stoffer etisk forsvarlig? Denne teksten bruker kriminaliseringsteori som et rammeverk for å vurdere legitimiteten til det internasjonale regimet for bekjempelse av narkotika. Teksten analyserer eksplisitte og implisitte argumenter og antagelser som har blitt presentert av filosofer til støtte for eller som kritikk av gjeldende narkotikapolitikk og vurderer gyldigheten til disse argumenter og antagelser i lys av rådende empirisk forskning. På denne basis analyserer teksten i hvilken grad kriminaliseringsregimet lar seg forsvare ut ifra de fem tilgjengelige kriminaliseringsteoriene – legal moralisme, legal paternalisme, Mills skadeprinsipp, Kants frihetsprinsipp og nyaristotelisk dydsetikk. Konklusjonen er at ingen av disse kriminaliseringsteoriene kan legitimere narkotikakriminalisering, og at teoriene til både Kant og Mill synes å tale direkte imot en slik legitimering. Narkotikakriminalisering fremstår derfor som en etisk uforsvarlig politikk.

Foreword and acknowledgements

This text is part of an ongoing project that attempts to assess the ethical legitimacy of the international policy regime of drug criminalization. In its complete version, this assessment will consist of extensive reviews and discussions of empirical research embedded in an analytical framework of criminalization theoretic perspectives. However, the inclusion of these reviews and discussions of empirical research in the present text would double its length and thereby break the University of Bergen's constraints on master theses by a wide margin. As such, this material has been entirely removed, although some very brief reviews of relevant scientific literatures have been added to the discussions in Chapter 3, which is the main analytical chapter in this text.

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Introduction

Since the early 20th century, the world has been engaged in international cooperative efforts to suppress the use of some psychoactive drugs. Pursuing this objective has involved a substantive range of agreements and policies, including the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances at the United Nations. Signatories to these treaties are required to adopt measures against the production, distribution, and use of controlled substances, and although this does not necessarily require criminalization of possession for personal use (e.g., Collins, 2021), member states have generally responded with full criminalization of the relevant substances. I refer to these conventions and corresponding legislation at the national level as the international regime of drug control.

The purpose of this project is to assess whether the international regime of drug control is an ethically legitimate policy. A primary challenge for such an assessment is that drug policy touches upon a wide variety of academic disciplines. As philosopher Douglas Husak (2018) pointed out, pursuing an interest in drug policy

requires a willingness to wrestle with facts from many different disciplines – sociology, political science, pharmacology, psychology, history, biology, economics, neuroscience and criminology, to name just a few (Husak, 2018, p. 1).

This project, therefore, is necessarily interdisciplinary or multi-disciplinary. In order to accomplish its task, it will need to engage with several different academic literatures. To explicate the underlying complexities, it is helpful to consider the project in light of Kirst-Ashman's (2017) model of policy analysis, which examines a policy in terms of effectiveness, efficiency, ethical considerations, evaluations of alternatives, and establishment of recommendations for positive change. In order to assess the effectiveness of the criminalization regime, we need to understand how this regime affects the prevalence of drug abuse. On the surface level, this may seem like a task related predominantly to comparative epidemiology, which is the branch of medicine relating to the incidence, distribution, and control of diseases, or in this context the condition of drug abuse. However, there are hidden variables at play that probably distinguishes drug abuse from other epidemiological investigations. Kirst-Ashman's efficiency criterion asks whether there may be costs associated with the policy, and I believe it should be clear that one such cost incurred by the drug control regime is the growth of organized crime networks making huge profits on the illicit drug trade. In turn, the growth of organized crime groups competing for the lucrative drug trade leads to an increase in violent crime, as we have seen very clearly especially in Latin America over the past

decades. Is it possible that ordinary citizens living in areas of exploding violence are more likely to turn to drug use in order to obtain a brief respite from their troubled lives? This possibility seems to bring perspectives from criminology, sociology, and psychology into play. Is it also possible that the profitability of the illicit drug trade serves to recruit young people into drug dealing, and thereby often into drug use as well? Economists may have perspectives on such questions.

Kirst-Ashman's third criterion involves ethical considerations, and the policy of drug criminalization seems to involve a substantial number of such considerations. To what extent may governments curtail citizens' sovereignty (or freedom) in order to protect them from perceived dangers? Does drug use by itself constrain a person's sovereignty, and if so, to what extent may governments attempt to preserve citizens' sovereignty by protecting them from activities that will constrain their sovereignty? These are questions of interest not least to Kantian and Millian philosophers. Other ethical conundrums have already been introduced, such as the increase in violent crime that the criminalization regime seems to entail. How much violent crime can we accept as a consequence of a policy intended to protect people from harm? Given that the relevant harms may not be directly comparable, this may seem like a normative philosophical question. On the other hand, the question has boundary conditions that seem more easily approachable, as it appears straightforward to argue that a harm-minimizing policy cannot cause more deaths than what it protects against. Relatedly, the harms incurred by illicit drug use often seem to have been substantially exaggerated in pro-criminalization discourse. It appears from comparative harms research that many illicit drugs are considerably less harmful than the legal drugs alcohol and tobacco, and presenting the former as a particularly grave danger may in this light appear essentially as a falsehood. While we can easily imagine that such harms exaggerations have been well intended, for instance as a means of discouraging young people from experimenting with drugs, a communication strategy based on deceitful exaggeration is not ethically unproblematic.

When we also observe that the drugs subject to exaggerated harms claims happen to be those drugs favored historically by Asians, Africans, Arabs, and indigenous Americans, while the drugs integrated into European societies since the 17th or 18th centuries have largely avoided such exaggerated claims and also avoided criminalization, a different set of questions arise. To what extent are present-day harms exaggerations an inheritance from the colonial era and its racial prejudice? Given the widespread evidence of racial bias in present-day drug policing, one might also ask: To what extent is such bias a continuation of the policies of racial suppression common to the colonial and early post-colonial eras? Or even: To what extent was the early drug criminalization regime implemented as a means of continued racial suppression under a guise of apparent neutrality? These may seem like questions for historians and critical race theorists.

We could go on, but the above should probably suffice to establish the point that drug policy is inherently multi-disciplinary. The following sections will outline the thesis here presented. Since the international regime of drug control is in its essence a policy of criminalization, Chapter 1 reviews what philosophers refer to as criminalization theory, which might be described as an evaluation of the legitimate scope of criminal law. The chapter presents the five main approaches to the question of how criminalization policies may be defended as legitimate and discusses which requirements would need to be fulfilled in order that drug criminalization might be assessed as a legitimate policy within the framework of each of those five approaches. Subsequent chapters will demonstrate that neither of these contenders in criminalization theory leads to a viable defense for drug criminalization.

Chapter 2 thereupon reviews the literature defending or criticizing the policy of drug criminalization and identifies what I see as its primary arguments and underlying assumptions. The version included here focuses exclusively on works by philosophers, while the full version also reviews work from legal professionals, anthropologists, sociologists, criminologists, economists, political scientists, theologians, and other professionals. The focus in this chapter is to identify and categorize these arguments and assumptions rather than to engage with them critically, although I acknowledge that it is difficult to provide a neutral summary of arguments one disagrees with. At any rate, the main critical analyses of these arguments and assumptions are deferred to later chapters, with a concluding assessment performed in Section 3.1.

In the full version of this text, a separate chapter proceeds to engage with a range of empirical issues that must be resolved in order to assess the effectiveness, efficiency, and legitimacy of the criminalization policy. This chapter has been excised from the abridged version, but I have preserved the below overview of its contents in order to provide the reader with a brief glimpse of the main issues and conclusions. The reviews and discussions of extant empirical evidence in this redacted chapter are based on my own contributions to the relevant scientific literature, much of which has been collected in my doctoral dissertations in psychology and the study of religions. As such, although the actual reviews of evidence are not available in this version of the text, the below overview may hopefully convince the reader of the author's familiarity with the relevant literatures.

The first issue reviewed is the question of drug harms. This discussion is based on material from my dissertation in psychology (Johnstad, 2022d) as well as a range of related publications (especially Johnstad, 2022a, 2023e), and it concludes that the available evidence indicates that illicit drug use is not generally more harmful than the use of the legal drugs alcohol and tobacco. In fact, some illicit drugs such as cannabis and psychedelics appear to be substantially less harmful than alcohol and

tobacco, which allows for the argument that if users of alcohol and tobacco were to replace these legal drugs with cannabis, the overall impact on public health would be positive. Psychostimulants such as amphetamine and cocaine for their part appear to be about equally harmful as alcohol. Furthermore, although there is not much research available, cannabis and psychedelics also appear not to be more harmful than everyday activities such as horse riding, sugary beverage consumption, and TV viewing.

Following this review of harmfulness, the complete version of this text proceeds to a discussion of the positive aspects of illicit drug use especially in terms of therapeutic and spiritual use. The discussion of therapeutic use is based on my dissertation in psychology and related publications (Johnstad, 2015, 2018b, 2020a, 2020c, 2021a, 2021c, 2022d), while the discussion of spiritual use is based on my dissertation in the study of religions and related publications (Johnstad, 2018a, 2020b, 2021b, 2021d, 2022b, 2022c, 2023a). The section concludes that presently illicit drugs appear to have substantial utility to users, and that the positive aspects of such drug use appear to have been as minimized as their harms have been exaggerated.

This observation that the harms of illicit drug use seem to have been systematically exaggerated and its benefits systematically downplayed serves as a foundation for a further discussion of two historical bases of drug criminalization. The historical bases in question are racial prejudice and a desire for religious purity analyzed in terms of the desire to maintain the authority and power of religious hierarchies. This discussion is based on the introductory chapter of my dissertation in the study of religions and is inspired particularly by the work of Talal Asad and Bruce Lincoln on the relationship between religion and power. The material in this section is currently under review for publication as an article (Johnstad, 2023b). The section concludes that there is an abundance of historical evidence supporting the notion that illicit drug use has been demonized on racist and religious grounds, and it appears that such demonization informed the late 19th and early 20th century exaggerations of drug harms by the medical establishments in Mexico and the United States. Arguably, present-day normative condemnation of illicit drug use is based on and serves to perpetuate the racial and religious biases of the colonial and early post-colonial eras.

The next section of the complete version of this text addresses the societal consequences of the drug criminalization regime in the present day. The chapter is informed especially by my work on drug criminalization in a human rights perspective (Johnstad, 2023c), and focuses on discussing evidence of a criminogenic (or crime-generating) effect. Most importantly, the criminalization regime appears to cause – directly and indirectly – a large number of homicides, disappearances, and incidents of torture especially in the Global South. Ironically, these costs of the criminalization policy are

sometimes cited as a reason to intensify the war on drugs, although previous attempts at such intensification in the United States, Brazil, and Mexico have tended to increase rather than decrease the extent of violent crime.

A further section of the complete text discusses the consequences of drug criminalization on the prevalence of drug use and drug abuse. The discussion is based on discussions in my dissertation in psychology and a related publication (Johnstad, 2022a, 2022d), and some of the material is currently under review for publication as an article (Johnstad, 2023d). Empirical evidence relating to a liberalization of the drug criminalization regime in the Netherlands, Switzerland, Portugal, Uruguay, Canada, and the United States indicates that overall prevalence has increased only marginally, while drug abuse and overall adolescent use appear not to have increased at all. However, the section also discusses the possibility that the criminalization regime may increase drug abuse in a manner that may not be immediately countered by liberalization. Several societal dynamics are pointed to here, the most important of which argues that if (i) drug criminalization causes a substantial amount of violent crime and (ii) drug abuse is commonly an escapist response to a life situation characterized by psychological trauma and social misery, then an unintended consequence of the criminalization regime may be increased drug abuse.

Finally, the last section of this chapter in the complete text discusses the role of law enforcement in perpetuating the drug control regime. Law enforcement may appear to be one of the most prominent interest groups in western societies favoring a continuation of the war on drugs, and it is therefore important to analyze what motivations may support this strong level of support. Besides issues of funding and turf, this section discusses prior commitment and biases related to selection effects and ethnoracial divides as possible motivations for such support.

Returning to the material that is included in the present version of the text, Chapter 3 presents the overall conclusions of this investigation. It does so with a layered approach that starts by reengaging with the literature reviewed in Chapter 2 as seen through the lenses of the relevant scientific literature. Proceeding from this layer of conclusions, the following layer returns to the criminalization theoretic framework established in Chapter 1 and attempts to assess whether any of the candidate theories supports drug criminalization. This question is answered in the negative.

Terminology

It is important to understand that the term “illicit drugs” does not point to a set of substances that have many things in common while being clearly different from alcohol, tobacco, and coffee (see for

instance the discussions in Husak, 1992 or Lovering, 2015). As I discuss in some detail in Section 3.1 (available, alas, only in the full version), the only thing “illicit drugs” or “narcotics” have in common is that they are generally criminalized. This designation according to legal status is also somewhat ambiguous, however, as on the one hand, Muslim countries such as Saudi Arabia, Iran, and Pakistan criminalize alcohol, and on the other, there has been a wave of decriminalization especially of cannabis over the past decades. Although the global drug war alliance now seems to be fracturing, the terms “illicit drugs” and “narcotics” (and cognates) are still meaningful in the sense that they can be taken to refer to whatever substances are specified in the abovementioned United Nations conventions. As problematic and arbitrary as this designation may be, it is useful to have a term that allows one to refer to the substances that have been targeted for suppression without listing them all by name. Thus, I use “illicit drugs” for substances covered by these conventions – even though some of them are now legalized or decriminalized to a fairly large extent – and “drugs” more generally as a term for any kind of psychoactive substance including, in principle, alcohol, tobacco, coffee, tea, and chocolate. In a context of criminalization, however, “drug” is commonly used as a shorthand for “illicit drug” and thus with the implicit exclusion of legal drugs. One example is the phrase “war on drugs”, which does not point to a war on alcohol and tobacco.

Furthermore, I will endeavor to distinguish as clearly as possible between the terms “drug use” and “drug abuse”. The latter refers specifically to harmful drug use, typically in a context of addiction, dependence, or drug use disorder, and thus stands in contradistinction to the former, which I use to refer to drug use that is not inherently harmful or where the level of harm is unknown. According to the definition by pharmacologist Samuel Irwin,

Drug use results when the sought for effects of a drug are realized with minimal hazard, whether or not used therapeutically, legally or prescribed by a physician. [...] Drug abuse follows when a drug is taken (sporadically, repeatedly or compulsively) to such degree as to greatly increase the hazard or to impair the ability of the individual to adequately function or cope with his circumstances (Irwin, 1973, pp. 11–12).

As an added complication, however, we should note that the term “drug use” can also be used as an umbrella term that covers any form of use, including abuse. For this reason, “drug use” is a term somewhat lacking in specificity, while “drug abuse” refers specifically to the harmful and negative aspects of use. In one sense, therefore, abuse is a form of use, while in another sense the two terms stand opposed to each other as a practice that is either harmful or non-harmful to the user. This variation in meaning, with “use” being employed variously as a generic and a specific term, admittedly opens for confusion and misunderstanding, but I will try to ameliorate these problems by communicating as clearly as possible.

For reasons of simplicity, furthermore, I sometimes speak of “addiction”, although this term has been criticized for confusing physical and behavioral dependency, or for relating only to the former and thereby ignoring the latter, which is perhaps equally problematic. In this text, the term “addiction” and related terms such as “addictiveness” will be used to refer to compulsively repetitive drug use, without concern for which functional dynamics may be involved. What is important in the present context is that addiction may cause people to engage in repetitive drug use and to act in unfortunate ways because of a craving for drug effects.

Discussions of drug policy often differentiate between decriminalization, which refers to depenalization for personal drug use, and legalization, which would allow for the regulated distribution of presently illicit drugs. It is not entirely clear whether the international regime of drug control mandates the criminalization of drug use (e.g., Collins, 2021), but as we shall see in subsequent chapters, the question is also largely irrelevant for this policy analysis. Most of the issues here under discussion apply in equal measure to “light” criminalization focused exclusively on suppliers and to “full” criminalization also of personal possession and use. The main exceptions relate to the surge in incarceration arising as a consequence of the drug war from the 1980s onwards and harms caused to users, both of which are important issues that would arguably be ameliorated by the decriminalization of personal drug use. However, I will argue in this dissertation that the decriminalization of personal possession and use, while constituting a step in the right direction, will not address most other problematic consequences of the criminalization regime. In particular, such decriminalization will not affect the criminogenic dynamics entailed by illicit drug markets and therefore not solve the problem of violent crime resulting from such markets.

Chapter 1: A criminalization theoretic framework

Democratic political regimes afford citizens with a range of rights and liberties that serve to constrain the scope of criminal law. Criminalization theory can be described as the attempt to define the proper scope of criminal law on a basis of a single underlying principle. In order to justify and legitimize a policy of criminalization, it should be possible to defend it according to one or more such criminalization theoretic principles. This chapter reviews five criminalization theoretic perspectives and presents an analytical framework for how drug criminalization might be defended or criticized on the basis of each such perspective.

The first two perspectives here discussed are legal moralism and legal paternalism, according to which actions can be criminalized either because they are inherently immoral or because such criminalization would be in the best interest of the actor according to some set of criteria. The third perspective is based on Mill's *On liberty* (1859/2001), which takes the principle of *harm to others* as its criterion for determining whether certain actions should be criminalized. This perspective is critical of moralistic and paternalistic approaches to criminalization and presents itself as a more rational alternative. The fourth perspective is based on Kant's Doctrine of right, found in the first part of his *Metaphysics of morals* (1797/1996), and takes the principle of reciprocal *freedom* (or *sovereignty*) as its basic criterion. This perspective is explicitly anti-paternalistic, but also opens for the possibility that government has a right to demand from citizens that they maintain their capacity to make independent decisions about matters relevant to the commonwealth. Finally, the fifth perspective is a neo-Aristotelian take on virtue ethics emphasizing the societal conditions for human flourishing, here discussed on a basis of Yankah (2011).

In order to legitimize criminalization policy, it should be possible to defend the policy within the structure of at least one of these criminalization theoretic contenders. The discussion will not attempt to assess the contending theories in terms of their overall societal value or appropriateness, but the final section in this chapter provides an analytic overview of how drug criminalization might be justified according to the five different perspectives. In Section 3.2 I will return to this criminalization theoretic framework with an analysis of how its various requirements may be regarded as fulfilled in light of the intervening reviews and discussions of empirical evidence related to drug criminalization.

1.1 Legal moralism

Legal moralism presupposes a set of widely shared moral values and sees government as the guarantor of their continuation. In order to uphold these moral values, government has the right – perhaps the duty – to criminalize behavior that transgresses against them. This entails, in the words of Feinberg (1984), that it “can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or to others” (p. 27).

Moralistic approaches to criminalization are regarded as problematic on a number of grounds, most obvious of which is the observation that moral values tend not to be universally shared, and it is not clear why the majority view should be regarded as compelling. Stanton-Ife (2016) used the example of homosexuality to illustrate this point: while homosexual behavior was once regarded as morally problematic and, therefore, as a suitable candidate for criminalization, that view is no longer a majority opinion in most western societies. Similarly, it may have been the case that most people in certain societies once regarded slavery as morally permissible. Since it would be impractical to criminalize every kind of immoral behavior including for instance lying and laziness, furthermore, legal moralism is also problematic in failing to provide criteria for identifying which kinds of immoral behavior should be criminalized.

One possible means of disentangling legal moralism from culture-specific values, however, is to associate the theory with a conceptualization of ‘core crimes’ that are regarded as universal. The concept of core crimes is taken from international law (e.g., Soler, 2019), which counts genocide, war crimes, crimes against humanity, and the crime of aggression as core crimes. Adapted to this discussion, a core crime is any behavior that is cross-culturally regarded as criminally immoral, with possible candidates including for instance matricide and patricide. This is perhaps the only foundation for legal moralism that would make it relevant as a theory of criminalization under a modern democratic regime. However, it is not clear whether there are any core crimes that do not involve causing harm to others, and which are therefore more specifically covered especially by the Millian approach to criminalization theory described below.

From a perspective of legal moralism, the basis for criminalizing drug use is that drug use is inherently immoral. This could be argued either universally, in the sense that one sees every deviation from sobriety as immoral, or particularly for certain types of such deviation. In the first case, it would be helpful to identify characteristics of intoxication that can support the assertion of immorality, and which are shared by all forms of drug use. Furthermore, such characteristics should be absent from other phenomena that are not regarded as immoral, or it would be necessary to explain why these characteristics confer immorality upon intoxication (deviation from sobriety) but

not on the other phenomena. However, it might also be possible to contend that the wrongness of drug use is a brute fact that requires no explanation. In other words, one could hold that drug use is wrong in the same way as matricide is wrong, with the fact of its wrongness being (arguably) obvious and therefore not requiring justification.

In the second case, the assessment that certain forms or types of intoxication are immoral would be supported by the identification of relevant characteristics specific to these forms or types that are absent from other forms of intoxication not deemed immoral. It is also possible to argue specifically for the immorality of drug abuse, as opposed to drug use in general, allowing for a distinction based on which types of drugs are more easily abused. Relatedly, one might argue that drug use or abuse is immoral not so much because of the acute effects of intoxication, but because of the long-term effects on health, thus effectively blending the argument from legal moralism with that from legal paternalism discussed below. For such an argument to be successful, one should demonstrate that drug use has worse health consequences than other behaviors that are not regarded as immoral.

1.2 Legal paternalism

Dworkin (2020) defined paternalism as “the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm” (Chapter 1, para. 1). Legal paternalism refers to the interference of a state in the form of criminalization. In practice, legal paternalism may tend to blend into legal moralism, since what is harmful to a person may also be seen as immoral, and any immoral act may be seen to incur moral harm to the agent. The focus in legal paternalism is on protecting people from harming themselves, which limits its scope as a general criminalization theory since the problem with most forms of crime is the harm caused to victims, not to perpetrators.

Other challenges for legal paternalism include epistemological concerns and concerns about autonomy rights (Hörnle, 2014). It is not clear on what basis government should declare certain behaviors universally harmful, and an attempt to protect citizens from their own bad choices would perhaps run the risk of also protecting us from learning from our mistakes. It seems possible that, at least in some cases, an individual’s long-term interests are best served by being allowed to make bad choices. This point touches upon Kantian objections to paternalism based on autonomy concerns:

Kantian views are frequently absolutistic in their objections to paternalism. On these views we must always respect the rational agency of other persons. To deny an adult the right to make

their own decisions, however mistaken from some standpoint they are, is to treat them as simply means to their own good, rather than as ends in themselves (Dworkin, 2020, Chapter 3, para. 9).

Hörnle (2014) also contended that in a context specifically of criminalization, it would be difficult to argue that the imposition of non-trivial punishment is in the interest of the person who is punished. Nevertheless, it might be possible that the harm incurred by such punishment is smaller than the harm incurred by the criminalized behavior, so that the net value of being punished is positive for the criminal if the punishment serves to protect this person from further involvement in the criminalized behavior. It may be also possible to take a position of “extended paternalism” that favors the criminalization of certain behaviors as being in the interest of citizens in general, even if the punishment of specific individuals for this behavior cannot be said to be in their personal interest. This position entails a willingness to sacrifice the interests of the few in order to preserve the (perceived) interests of the many. Such a position might be said to approach the perspective on harm to others, as discussed below.

Drug criminalization on the basis of legal paternalism demands that the criminalized drugs are harmful to use. Since there is potential harm in almost any kind of activity, a paternalistic approach to drug criminalization also needs to demonstrate that the harm incurred by drug use is different from the harm incurred by non-criminalized activities. Two possible grounds for treating drug use differentially from other potentially harmful activities may be that the harm from drug use is more severe than the harm from other activities, and that the harm from drug use, in contrast for instance to the harm from driving a car, is not balanced by utility. However, it may also be possible to argue that even if drug use is less harmful than other non-criminalized activities, drug criminalization is still justified because this criminalization policy is more convenient, practically manageable, or expedient than the criminalization of other, more harmful activities. On such a basis, for instance, one could claim that it is legitimate to criminalize currently illicit drugs even if those drugs are less harmful than alcohol, because alcohol use is so widespread as to make its effective criminalization very difficult in practice.

In sum, the criminalization of drug use from a paternalistic perspective should demonstrate either that drug use is especially harmful, that it does not have the same utility as other forms of equally harmful behavior or identify some other reason for treating drug use differentially from other forms of potentially harmful behavior. Regardless of how the basis for sufficient harmfulness is established, however, it would also be required from a policy of drug criminalization intended to protect citizens from self-inflicted harm that the net effect of its implementation is an actual reduction of harm.

1.3 Harm to others

Mill (1859/2001) defended the principle of *harm to others* as an alternative especially to paternalistic approaches to criminalization. He maintained that

the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign (Mill, 1859/2001, p. 13).

As Hörnle (2014) and others have pointed out, however, it is not entirely clear from Mill's discussion how we are to understand either 'harm' or 'others'. Personalized harm in the form of bodily injury or the removal of material assets is perhaps uncomplicated, but it would seem that a person could also claim to be harmed for instance by being confronted with something they consider disgusting or immoral. Mill counted "offences against decency" as examples of violations that could be regarded as causing harms against others (p. 90), but such an understanding of harms would allow people to claim they are being harmed by seeing, for instance, homosexuals kissing in the street. It is also not clear if harm should include disutility, for instance in the form of increased welfare costs. If so, I could perhaps claim that if you engage in activities that increase the probability that you will end up as a welfare client, these activities are causing me harm by raising my taxes.

Furthermore, many forms of harm may not be directed toward any specific individual, but rather takes the form of harm to collectively shared interests. Such collective harm could be of a substantial or material type, as with pollution harming the environment, but might also extend to issues such as shared norms, ideals, and moral principles, public peace, and the national interest. Thus, it seems I may contend that if you walk naked in the streets, your 'offence against decency' harms me personally because of the unpleasant sight I am forced to behold and also harms collective interests because it contributes to the erosion of (worthy) moral principles. Feinberg (1984) defined harm as "the thwarting, setting back or defeating of an interest" (p. 33), but this would seemingly still allow me to claim that your walking naked in the streets thwarts my interest in being protected from seeing unpleasant, disgusting, and/or immoral sights. Furthermore, Feinberg (1988) suggested

supplementing the harm principle with an offense principle for acts that are disturbing, but which do not harm others in the sense of having a lasting impact on their lives.

A second complication with Mill's harm principle refers to its insistence on considering only harm to others. This seems to imply a dualistic distinction between self and other that some people today might find problematic, perhaps with critical references to ideas of a Cartesian self or similar constructs. On a practical level, a person may have children or other dependents, arguably dissolving any clear distinction between harm to self and harm to others. As mentioned above, one could also say that the emergence of the welfare state has made individual welfare a collective concern: if you make poor life choices and end up being unable to take care of yourself, this harms not only you but also (in the form of disutility) all the people whose tax money will pay for your future welfare. Extending this argument a step further, one could claim more generally that my welfare depends on your welfare, for if your welfare is insecure this may lead you to desperate acts, and my welfare is threatened by having desperate people around.

Mill's (1859/2001) original discussion referred to drug use (in the form of alcohol use) on several occasions, and was generally skeptical of attempts to use criminal law to curb such use:

The limitation in number, for instance, of beer and spirit houses, for the express purpose of rendering them more difficult of access, and diminishing the occasions of temptation, not only exposes all to an inconvenience because there are some by whom the facility would be abused, but is suited only to a state of society in which the labouring classes are avowedly treated as children or savages, and placed under an education of restraint, to fit them for future admission to the privileges of freedom. This is not the principle on which the labouring classes are professedly governed in any free country; and no person who sets due value on freedom will give his adhesion to their being so governed, unless after all efforts have been exhausted to educate them for freedom and govern them as freemen, and it has been definitively proved that they can only be governed as children (Mill, 1859/2001, p. 93).

This defense of individual liberty that insists adults have a right to be governed as adults, without undue interference in their personal affairs, is reminiscent of Kant's approach to criminalization, which we will examine more closely in the next section. As Mill himself recognized, however, this type of defense opens up for concerns that it may be necessary in some cases to defend the liberty of the individual against his or her misuse of this liberty. Thus his famous denial of the right to sell oneself into slavery:

The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by

allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom (Mill, 1859/2001, p. 94).

The principle that one should not be free to alienate one's freedom seems applicable to the issue of drug criminalization, as it would be possible to argue that (some) drugs are both so addictive and so debilitating in their effects that people who become addicted to such drugs effectively abdicate their liberty and sell themselves into slavery. I will discuss this possibility further in the section on the sovereignty principle below. Before moving on to that discussion, however, it should be noted that although Mill was skeptical of drug criminalization, he was not opposed to it in all cases:

The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment. Drunkenness, for example, in ordinary cases, is not a fit subject for legislative interference; but I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself; that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offence, the punishment to which he would be liable for that other offence should be increased in severity. The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others (Mill, 1859/2001, pp. 89–90).

This opens for the possibility of a layered or segmented criminalization of drug use specifically for known perpetrators of harm to others while under the influence of (specific) drugs. While not directly relevant for the discussion of drug criminalization in general, I will return to this issue in my concluding remarks on how to implement a policy of drug legalization (available, alas, only in the complete version of this text).

An attempt to legitimize drug criminalization on the basis of a concern about harm to others must necessarily rely upon the identification of such harms. The most obvious approaches involve harms related to the confusion or aggression (putatively) inherent to the intoxicated state itself, harms related to addicted drug users' need for money to satisfy their cravings for drugs, and harms to dependents who are suffering neglect or worse because of parental drug abuse. It may also be possible to interpret disutility as a form of harm and point to costs of addiction treatment or other economic costs related to drug use. As with legal paternalism, however, a requirement for the

successful legitimation of drug criminalization on a basis of harm caused to others is that the policy should result in an overall reduction of such harms. Similarly, a successful defense of drug criminalization from this perspective should demonstrate that the harms caused by drug use are either more serious than harms from other activities, or that drug harms are not balanced by utility, or that matters of convenience or expedience justify a differentiation between drug use and other non-criminalized activities even when drug use is not more harmful than these other activities. A successful defense of blanket drug criminalization based on a concern about harm to others should also seek to demonstrate that all such drug use causes harm, rather than generalizing from one form of drug use to another. Thus, in order to justify the criminalization of drug use in general, the (putative) fact that drug abuse causes harm to others might seem insufficient unless it can be shown that drug use commonly ends up as drug abuse. Similarly, the (putative) fact that the use or abuse of one drug causes harm is not sufficient reason to criminalize another drug. By analogy, it is clear that some people cannot be trusted with the responsibility of driving a car on a public road and may cause much harm to others if they get behind the wheel, but our societies nevertheless allow driving on public roads. If the group of highly irresponsible drivers were large, it might be necessary to organize society differently, but the present situation clearly allows for specific and precise forms of regulation involving age limits, driver's licenses, speed limits, police controls, and so forth. Therefore, it would seem that a defense of a general criminalization regime should seek to demonstrate that it is impossible to reduce the harms from drug use to manageable levels through the application of similar forms for specific regulation.

1.4 Sovereignty

A fourth candidate for a foundation for criminalization theory is sometimes referred to as the *sovereignty principle* and can be traced back to Kant's (1797/1996) *Metaphysics of morals*. In Kant's formulation of the principle, the fundamental criterion for criminalization is that a criminal act is incompatible with reciprocal freedom:

Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law (Kant, 1797/1996, 6:230).

If a person's action or condition can coexist with the freedom of everyone in accordance with a universal law, then whoever hinders that person does that person wrong; for this hindrance cannot coexist with freedom in accordance with a universal law (Kant, 1797/1996, 6:231).

Ripstein (2006) formulated a modern version of the sovereignty principle, which he saw as resting on the idea that “the only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other” (p. 229). Understanding freedom in terms of mutual independence, Ripstein’s formulation of the sovereignty principle insists upon “each person’s ability to set and pursue his or her own purposes, consistent with the freedom of others to do the same” (p. 231). Thus, as a framework for criminalization theory, Ripstein’s reformulated sovereignty principle finds that

the only grounds for interfering with one person’s ability to set and pursue his or her own purposes is the need to protect the freedom of others. People will be free to do as they want, without legal interference, except where those hindrances are instances of other people’s freedom. [...] [A]ny criminal prohibition that does not protect sovereignty is a despotic violation of it (Ripstein, 2006, p. 245).

It would seem, therefore, that the sovereignty principle entails that people are free to do what they wish so long as their actions do not threaten other people’s freedom. A further constraint, however, is that the reciprocity inherent to the sovereignty principle demands that an activity can only be legitimately criminalized when the threat to freedom caused by performing the activity is greater than the threat to freedom caused by forbidding the activity. This limits the leeway for criminalizing activities because of moralistic concerns. This limits the latitude for criminalizing activities because of moralistic concerns. Thus, if a person claims that seeing homosexuals kissing in the street constrains their freedom, this claim must be weighed against the constraints imposed upon homosexuals by making special rules for their behavior that do not apply to heterosexuals. If I want to stop you from walking naked in the streets, I will have to argue that your walking around naked inhibits my freedom not only because I find public nakedness to be immoral and unpleasant, but for some weightier reason that can justify a constraint on your freedom, such as that I suspect public nakedness will increase the likelihood of sexual assault.

For Kant, the private rights of citizens had a counterpart in public right, which included the rights of the state:

The sum of the laws which are needed in order to bring about a rightful condition is public right. Public right is therefore a system of laws for a multitude of peoples needed for a rightful condition under a will uniting them, a constitution (Kant, 1797/1996, 6:309).

In order to enjoy civil rights, citizens therefore also have a duty to subject themselves to lawful coercion, and the resulting public right is a condition that secures their private rights. Furthermore, since the “legislative authority can belong only to the united will of the people” (6:314), the

individual citizen implicitly has a duty not to abdicate their sovereignty as a rightful contributor to the united will:

The only qualification for being a citizen is being fit to vote. But being fit to vote presupposes the independence of someone who, as one of the people, wants to be not just a part of the commonwealth but also a member of it, that is, a part of the commonwealth acting from his own choice in community with others. This quality of being independent, however, requires a distinction between active and passive citizens (Kant, 1797/1996, 6:314).

Kant's list of passive citizens, which included servants, minors, and women, is of little concern here, but in a context of drug criminalization it seems possible to argue that (excessive) drug use is an example of an activity that tends to pacify citizens and deprive them of their independence. By entering into a state of slavery to an addictive drug, as per the earlier interpretation of Mill, it may be argued that citizens not only abdicate their right to individual freedom, but also threaten the rights of the state by depriving the commonwealth of their independent contribution. According to such an argument, it may be necessary to preserve citizens' sovereignty in general by limiting their sovereignty for the specific subject of drug use. The main obstacle for such an attempt to preserve sovereignty in general by limiting sovereignty in a specific situation is that we do not usually aim to strengthen a phenomenon by weakening it. Therefore, we would expect that such an approach to the preservation of sovereignty would be limited to certain very unusual situations. Although it is easy to agree that the proposition of selling oneself into slavery seems like a case where it might be possible to preserve freedom by limiting it, we would also recognize that even in the absence of a law forbidding such a contract, it would probably be exceedingly rare that anyone wanted to sign one. Selling oneself into slavery is therefore an example of a very unusual situation, and we would not expect the law forbidding it to result in much litigation. It is possible that there are other, less unusual, situations where weakening sovereignty with regard to specific issues serves to strengthen sovereignty overall, but the prospect seems generally counterintuitive, and a successful defense of drug criminalization on this basis therefore needs to demonstrate why our intuitions are wrong about this matter.

A perhaps more Kantian way of discussing this issue would be to say that a policy regime intended to preserve sovereignty should (preferably) pursue this goal via means that in and of themselves instantiate a respect for sovereignty. Stated differently, we should aim to preserve sovereignty by using methods that, even when seen in isolation from the overall goal, instantiate a preservation of sovereignty. A policy regime that attempts to preserve overall sovereignty by restraining sovereignty specifically with regard to the issue of drug use may have a noble goal, but its method of achieving this goal does not itself preserve sovereignty and is therefore problematic. Finally, anyone wishing to

defend drug criminalization on a basis of such sovereignty concerns should also seek to demonstrate that some forms of drug use deprive the user of their sovereignty in a sense that the criminalization of drug use counteracts.

Besides this threat of pacification, drug use could be seen as a threat to freedom if drug users cause harm to other people, although legitimate criminalization on such a basis would require that the constraints on freedom related to such harms exceed the constraints on freedom caused by the criminalization regime. These latter types of constraints could be related to violent criminality arising as a consequence of the prohibition policy or to the utility of drug use.

1.5 Virtue

The final candidate for a foundation for criminalization theory that I will consider is sometimes referred to as the neo-Aristotelian aretaic perspective, which takes its name from the Greek ἀρετή (*areté*), meaning excellence or virtue. In the presentation of this perspective, I will draw upon a discussion of its relevance for cannabis decriminalization by Yankah (2011). In Yankah's formulation, aretaic theories of law "place law's role in the formation of good character, sound practical reasoning, and a flourishing life front and center" (p. 11).

One major difference between virtue-centered theories of law and Millian and Kantian approaches is that while the latter focus on individual rights and duties, the former focuses on human achievement and flourishing (Yankah, 2011). The notion of human flourishing refers to something beyond simple utility and pleasure and should probably be understood in terms of personal and societal potential realization; in the *Nicomachean ethics*, Aristotle connected human flourishing to excellence in expressing one's essential human nature. As an example of something that arguably would not support human flourishing, we could take Nozick's (1975/2013) thought experiment about the Experience Machine, which a person could program with experiences of their choice and then plug into, spending the rest of their lives inside the programmed reality. While (presumably) pleasant, life inside this program would limit us to experiences known to us at the time when we wrote the program, and this imposition of recurrent sameness in what we experience would stop us from flourishing in the sense of growing into something new.

Furthermore, the aretaic perspective is socially oriented rather than individually oriented in its concern with promoting virtue and suppressing vice, focusing on "whether a particular law promotes the development of virtuous citizens and a flourishing society over all" (Yankah, 2011, pp. 18–19). Specifying the criteria for what counts as human flourishing (or virtue) might, however, seem like a

challenge for this approach. For the issue of walking naked in the streets, the aretaic approach is to ask whether criminalizing such behavior supports the conditions that allow for human excellence. When considering this issue, the individual lawmaker should not judge the matter according to his or her first-order views on the morality of public nakedness, but rather according to an analysis of how criminalization or legalization would affect societal conditions in a broader sense. While avoiding the subjectivism of first-order views, this approach nevertheless seems to entail a certain relativism, as what is appropriate for a given society at a given time might not be appropriate for that society at a different time, or for a different society. The ultimate question for legal decisions

is to what extent a legal regime nurtures virtue and a flourishing society. Say alcohol is viewed as detracting from a life of virtue, a claim that, if not universally true, certainly applies to a significant range of cases. If the prohibition of alcohol leads to generalized disrespect for the law among the public, millions of dollars for criminal syndicates, and a reign of widespread violence and terror, then surely the law of prohibition cannot be considered to be robustly supported by a virtue-centered theory of law. A view that focuses only on the prohibited acts and ignores all other effect of a law on the health, virtue, and flourishing of a society is too narrow to be a plausible view of virtue-centered governing (Yankah, 2011, p. 20).

Applying this approach to the issue of cannabis criminalization, Yankah was not primarily concerned with whether cannabis use is a vice, but with the broader effect of prohibition on society. Even if cannabis use is not “compatible with bringing out the best of our rational practices” (p. 18), the benefits of restricting its use must be weighed against the putative detrimental effects of the criminalization regime on society. Identifying especially the racial disparity inherent to the current regime, and its plausible effect in breeding a sense of injustice among minority offenders, Yankah was therefore led to the conclusion that

[T]he current regime of prohibition undermines rather than promotes a virtuous society. The prohibition institutionalizes a level of lawlessness among the population. It breeds contempt, distrust, and disrespect for the law. It empowers the police to monitor and invade the privacy of vast numbers of citizens. Most importantly, it results in the arrest and imprisonment of countless black men and other minorities, breeding anger and resentment while hollowing out communities (Yankah, 2011, p. 22).

The aretaic approach to criminalization theory assesses the potential criminalization of a given activity in a perspective that is holistic, societal, and pragmatic. It is holistic in its willingness to consider all kinds of effects and viewpoints, including those of legal moralism, legal paternalism, and the perspectives of harm to others and sovereignty, and societal in its focus on the overall impact from criminalization on society understood as an arena for human flourishing. Furthermore, it is

pragmatic in the sense that it is willing to assess potential criminalization according to its impact on society as it exists here and now. As society changes, the overall assessment of how an activity and its potential criminalization might affect society will also change.

From this perspective, drug criminalization is legitimate if it has an overall positive effect on the societal conditions for human flourishing. To defend criminalization from this perspective, one might therefore specify the costs and benefits of criminalizing drugs on one hand, and the costs and benefits of not criminalizing drugs on the other hand. If the benefits of criminalization plus the costs of non-criminalization outweigh the benefits of non-criminalization plus the costs of criminalization, then the criminalization regime may be regarded as legitimate. The benefits of criminalization and the costs of non-criminalization probably blend into one another, and might be argued on the case that drug use curbs human flourishing because of addictions and social problems related to drug abuse, and that criminalization supports flourishing by curbing use. On the opposite side of the equation, the costs of criminalization might include any unintended side effects arising from the policy regime that do not support flourishing, and the benefits of non-criminalization might be argued with reference to the utility of drug use in supporting human flourishing.

1.6 Conclusion

This chapter has discussed the five main approaches to criminalization theory and outlined a framework for how drug criminalization might be defended from each such perspective. If drug criminalization is a legitimate policy under a democratic political regime, it should be possible to find support for it in at least one of these five criminalization theoretic contenders. Should this task prove difficult, on the other hand, it would be possible to conclude that drug criminalization is illegitimate.

The discussion identified a number of concerns that might serve to support a specific criminalization theoretic defense of drug criminalization. One fundamental issue relates to harmfulness. In order to defend the criminalization policy, one would normally seek to establish that illicit drug use is very harmful both to the users themselves and to other people. The best way to establish this point is probably to identify harms assessments that compare the respective dangers of illicit drug use with other activities, most obviously the dangers of licit drug use. A second fundamental issue relates to prevalence, as it would be difficult to defend a criminalization policy that does not reduce the extent of the criminalized behavior. These two issues seem to constitute the basic building blocks for any defense of drug criminalization irrespectively of one's criminalization theoretic approach, although with a possible exception for legal moralism. Although harmfulness is clearly a potential basis for the moral condemnation of drug use, such condemnation might also find a different fundament.

Furthermore, it may be possible from this perspective to maintain that criminalization serves to express moral indignation over drug use and is therefore worthwhile even if it does not entail a reduction in drug use.

Beyond these two fundamental issues, the discussion also noted the relevance of utility and what was referred to as convenience or expedience. Should the assessment of comparative harmfulness or prevalence not provide a clear basis for drug criminalization, a comparison of utility might serve as a possible basis of differentiating illicit drug use from the use of alcohol or tobacco, or from other recreational activities. More tenuously, expedience might serve the same purpose, as one might argue that the fact that one harmful activity is not criminalized does not necessarily entail that it is wrong to criminalize other harmful activities. I will return to this criminalization theoretic framework in Section 3.2 with an analysis of how well the various theories succeed in legitimizing drug criminalization.

Chapter 2: Review of arguments and assumptions

Having briefly reviewed five candidates for criminalization theory in Chapter 1, Chapter 2 will proceed with a review of published arguments for and against the drug war. Although the reviewed publications generally do not refer to any explicit criminalization theoretic framework, an attempt will be made to position their arguments within such a framework. In addition, the review attempts to identify the assumptions underlying their arguments. These assumptions are commonly unacknowledged and unquestioned, but they are also often highly problematic. In this chapter, I will merely point to potentially problematic assumptions without engaging in further discussion, but I will return to a discussion of these issues in Section 3.1.

The works reviewed in this chapter were selected in order to cover all the major arguments for and against criminalization in philosophy and a range of other academic disciplines. Since philosophers in particular tend not to provide extensive literature reviews in their articles, however, it has proven difficult to identify all relevant works, and many contributions must be assumed missing. This applies particularly to contributions that have not been published in academic journals, and which are therefore not readily available via internet search engines. Furthermore, I have ignored works that mainly repeat earlier arguments, even if these works are often valuable in terms of the overview they provide and their ability to contextualize arguments within a framework of scientific research. That said, the works reviewed here include fifteen contributions from philosophers (Anomaly, 2013; Corlett, 2013; Cudd, 1990; de Marneffe, 1996, 2003; Hsiao, 2017, 2019; Hunt, 2003; Husak, 1992, 2003, 2007; Lovering, 2015; Richards, 1981; Sher, 2003; Smith, 2002) as well as one contribution from a group of bioethicists and other professionals (Earp et al., 2021) and another from a pair of theologians (Sullivan & Austriaco, 2016) that is largely philosophical in its approach. The full version also includes four contributions from legal professionals (Bone, 2020; Gerber, 2004; Kaplan, 1988; Kurzman & Magell, 1977), three from anthropologists, sociologists, or criminologists (Bourgois, 2015, 2018; Christie & Bruun, 1985/2003), three from economists (Coyne & Hall, 2017; Friedman, 1972; Miron & Zwiebel, 1995), two from political scientists (Nadelmann, 1992; Wilson, 1990), and one each from a government official (Lawn, 1990), a journalist (Hari, 2015), and a group of politicians (Global Commission on Drug Policy, 2011).

I would be inclined to opine that the neglect of literature review sections especially in philosophy articles has proven unfortunate for the discussion of drug criminalization, as it appears that the people involved not infrequently talk past one another, and that the debate would have profited from a higher extent of coherence or integration. On several occasions, new contributions to the literature have raised issues that have already been extensively discussed in previous contributions,

resulting in a fragmented and repetitive debate. The extensive literature review undertaken below will hopefully contribute to a clearer overview of arguments for and against drug criminalization, and could serve as a summary of the state of the discourse and thereby as a knowledge basis for future contributions that aims to add to the debate rather than repeating it.

Some of the works reviewed in this chapter, particularly Lovering (2015), Sullivan and Austriaco (2016), and Hsiao (2017), focused on assessing the moral worthiness of (illicit) drug use rather than the merits of the policy of drug criminalization. Although these issues are distinct in many ways and should not be conflated, I believe the discussion of these works are relevant also for the assessment of the drug war policy. While the moral wrongness of a given behavior is not a sufficient condition for the legitimate criminalization of this behavior – it is coherent to maintain that a behavior is wrong while also maintaining that its criminalization would be wrong or unwise – an assessment of moral wrongness should probably be regarded as a necessary condition for legitimate criminalization. At a minimum, I do not believe it is very common in modern democratic polities to criminalize behaviors (as felonies) without having assessed such behaviors as being morally wrong.

2.1 David A. J. Richards (1981)

In a wide-ranging defense of the human right to use drugs, Richards rejected the view that drug use is intrinsically degrading and destructive to self and others. Instead, he maintained that we should understand and respect drug use within the context of the rights that free and rational beings have to determine the meanings of their own lives and projects. Agreeing that drug use is not risk free, Richards argued that there are many valued forms of activity that involve heightened health risk, and that the right of persons to engage in high-risk occupations and activities is generally uncontroversial. Since drug use is not more dangerous than other forms of socially accepted risky behavior, it should be protected by the right to privacy; furthermore, some forms of drug use should be understood as a spiritual exploration and deserve protection under the right to religion.

In order to understand the moral condemnation of drug use in the United States, Richards engaged in a project of “moral archaeology” that attempted to trace this condemnation back to its roots, one of which he identified as Christian orthodoxy. While drug use in religious contexts has been accepted in many cultures, Christianity repudiated such practices, setting the scene for a subsequent denunciation of all drug use as immoral:

In the West, Christianity appears to have sharply repudiated the use of drugs as an organon of religious experience, finding it to be a form of the Gnostic heresy. Shamanic possession and

ecstasy, at the heart of much earlier religion, becomes, from this perspective, one form of demonic or satanic witchcraft, a charge that Catholic missionaries made against the shamanic practices they encountered in the New World. The leading contemporary defender of this Judaeo-Christian repudiation, R. C. Zaehner, has argued that the technology of the self implicit in the orthodox Western religions requires an unbridgeable gap between the human and the divine, expressed in the submission of the self to ethical imperatives by which persons express their common humanity and a religious humility. Accordingly, Western, in contrast to non-Western, mystical experience expresses the distance between the human and the divine. Drugs, including alcohol, are ruled out as stimuli to religious experience because they bridge this distance, allowing the narcissistic perception that the user himself is divine and thus free of the constraints of ethical submission (Richards, 1981, p. 632).

For Richards, this repudiation of foreign religious practices also had a clear ethnic component, as the drive for prohibition in the United States was anchored in Protestant groups and often targeted non-Protestants:

The use of liquor in the United States was identified with the Catholic immigrants and their subversive (non-Protestant) values; when heroin came under attack, it was identified with Chinese influences from which America, it was said, must be protected; marijuana was associated with undesirable Hispanic influences on American values; and cocaine with Black influences. It is difficult to see anything in these claims but familiar sociological manifestations of cultural hegemony (Richards, 1981, pp. 663–664).

When proponents of drug criminalization claim that drug use is degrading and immoral, it may therefore seem that this moral condemnation has its roots in an ethn racial and religious repudiation of foreign cultural practices. Richards also found that those who condemn drug use as immoral according to their religious belief would often base their arguments for drug criminalization on what he called “the perfectionist ideal of self-control as a compulsory moral standard” (p. 653). He objected to the legal enforcement of such models of self-control because this ignores the role of self-determination for moral personality, depriving people of autonomous choice:

There is no reason to believe that [this] is the only legitimate model of responsible self-control, the only means of human fulfillment. There are many other courses that may reasonably and responsibly accommodate the diverse individuality of human competences, aspirations, and ends. What for one is a reasonable self-imposed ideal of self-control and social service may be for another a self-defeating impoverishment of human experience and imagination, a rigid and inflexible willfulness without intelligent freedom or reasonable spontaneity, a masochistic denial of self and subjectivity in the service of uncritical and dubiously manipulative moral aims (Richards, 1981, pp. 653–654).

Finally, Richards was not impressed by arguments for criminalization based on assertions of health risks and other harms to self and others, because “criminalization probably exacerbates the self-destructiveness of the conduct it ostensibly aims to combat” (p. 663). In his view, this paradox of criminalization applied to both the major issues that have been presented as negative consequences of drug use, namely harms to health and increases in crime. With regard to the former, “[m]any of the harms cited as the basis for criminalization could be avoided by the same forms of regulation that are applied to presently legal drugs” (p. 646). Without such regulation, it is hard for users to determine the purity of the drugs they acquire, which may result in accidental overdoses. Furthermore, Richards believed that the stigma of crime might encourage drug dependence, while also complicating the detection and possible control of addiction. With proper regulation and supervision, heroin users “could hold regular jobs and lead otherwise conventional lives,” but since criminalization has made such practices impossible, “illegal and unsupervised forms of heroin use have become both more injurious and more likely to be associated with a socially unproductive criminal underworld life” (p. 663).

With regard to increases in crime, Richards similarly found that criminalization exacerbates the problem it is supposed to solve, as it “forces drug users into illegal conduct to obtain money for drugs and brings them into contact with the criminal underground” (p. 645). In the same way, he found “no factual support for the proposition that many drugs currently criminalized lead to violent attacks on the interests of others; indeed, criminalization appears itself to foster, not combat, such links of drug use to attacks on others” (p. 660). To Richards, therefore, “[a]rguments of criminogenesis are generally circular and question begging; they argue for criminalization of drug use on the basis of the evils that criminalization, not drug use, fosters” (p. 646). In conclusion, he found that “there are no good moral arguments for criminalizing many forms of drug use,” and that state-administered punishment for drug use “is a violation of the rights of the person” (p. 678).

Richards placed his argumentation against drug criminalization in an explicit neo-Kantian framework that emphasizes autonomy and human rights, rejecting moralistic and paternalistic bases for criminalization. In his archaeological exploration of the motivation behind Christianity-based condemnations of drug use, he may seem to have assumed that he understands the motives driving such criminalization advocates better than they do themselves. Finally, when Richards criticized the drug criminalization regime for exacerbating the negative consequences for health and crime that it was ostensibly intended to reduce, he assumed that decriminalization would not increase drug use to such an extent that the overall societal impact would be worse than under criminalization.

2.2 Ann E. Cudd (1990)

In this article, Cudd defended the view that “in a liberal society citizens have the right to take most drugs” (p. 30). Taking Millian liberalism as her starting point, she found that the state may legitimately control actions that can be shown to be necessarily irrational, but argued that the preference for (non-medical) drug use may be rational in some cases. Her argument was built on an analysis both of what she called strategic irrationality, where the state may legitimately criminalize actions that lead to socially and individually suboptimal outcomes, and on individual irrationality. With regard to the former, Cudd’s game-theoretic analysis indicated that the state may have good reason to criminalize the athletic use of anabolic steroids, since these drugs can lead to a state of strategic irrationality where players would prefer that no one uses steroids, but end up using steroids themselves in order to be able to compete with other steroids-using players. Beyond this limited case, she found no justifiable rationale for criminalizing drugs in general because of strategic considerations.

On the level of individual irrationality, the use of drugs that could lead to addiction may seem irrational since addiction serves as a constraint on future choices. According to Cudd, however, “we can imagine circumstances under which rational people would choose addiction over abstinence” (p. 27), and although the preference for addiction-forming drug use may be irrational in some cases, it is therefore not so in all cases. Furthermore, although drug use may serve to reduce some people’s future fulfillment, this is hard to predict for any given individual since “there is nothing less law-abiding (in the sense of scientific law) than the course of human lives” (p. 29). Thus drug use, even with regard to addictive drugs, cannot be shown to be necessarily irrational, and Cudd concluded that “a liberal society cannot legitimately or consistently outlaw the taking of drugs, other than anabolic steroids, on paternalist grounds. To be sure, the reader might respond that that is a *reductio* on liberalism” (p. 30; emphasis in original).

We can identify a number of assumptions underlying Cudd’s argumentation, the most important of which she pointed to in her closing line about the *reductio* on liberalism. Cudd seems to assume that a liberal society must be so principled in its adherence to liberalism that it only criminalizes actions that are *necessarily* irrational, as opposed to mostly irrational or almost-always irrational. However, it seems possible that some liberal-minded people who are skeptical about allowing drug use would dismiss this argument with the comment that they are not fanatic or one-sided liberals who wish to extol liberalist principles at any cost, and if drug use can be shown to be mostly irrational that will suffice to make an exception from otherwise worthy principles in order to keep society stable and safe. Cudd also assumed that drug use does not cause significant harm to others:

I assume that there is no significant harm-to-others issue here. There are arguments one could marshal against this claim, such as that taking drugs causes (a sufficiently high proportion of) users to do anything necessary to ensure a future supply of drugs, and hence is a cause of violence, or that taking drugs illegitimately increases the tax burden on the rest of society by raising the probability that one will require medical care. But in the first instance one could argue that the criminalization of drugs is largely to blame, and in the second football would face the same objection (Cudd, 1990, pp. 18–19).

2.3 Douglas N. Husak (1992, 2003, 2007)

Husak is a legal philosopher who has been arguing the case for drug decriminalization in a number of books and articles. His 1992 monograph entitled “Drugs and rights” rejected utilitarian assessments of the drug war, which Husak saw as being prone to overconfident speculation, and instead argued that people have a moral right to autonomy and therefore to use drugs. If there is a moral right to (illicit) drug use, cost-benefit analyses and similar approaches are arguably irrelevant:

[N]o one inquires whether television produces a net balance of costs over benefits, as part of a movement to make watching television illegal. Why not? Surely the answer cannot be that television obviously produces a net benefit to society. A better answer is that persons have a moral right to watch television, and cost-benefit analyses are compelling arguments only for activities unprotected by a moral right (Husak, 1992, p. 59).

Nevertheless, Husak conceded that “[a]dults do not have an absolute moral right to use any imaginable recreational drug, whatever its effects on them might be” (p. 73). He noted that many philosophers have rejected the idea that governments can legitimately restrict citizens’ liberty in order to prevent them from causing harm to themselves, but did not advocate the libertarian position that any attempt to constrain liberty in order to protect citizens from harm is necessarily illegitimate. In order to qualify as legitimate exception to the principle that autonomy is prioritized, however, the harms incurred would have to be exceptional. On Husak’s reading of the relevant harms statistics, the harms incurred by illicit drug use are generally smaller than those incurred by alcohol and tobacco use, and the criminalization of the former could not therefore be justified on the basis that illicit drug use is exceptionally harmful.

Husak proceeded to discuss various objections to his account, one of which related to the relationship between addiction and autonomy. He noted that some observers have maintained that addictions deprive people of the capacity for autonomous choice, and in this light the attempt to suppress addictive drug use via criminalization policies may support autonomy. However, Husak

observed that while licit drugs such as alcohol and tobacco are addictive, some illicit drugs including psychedelics are not. More fundamentally, he analyzed the concept of addiction in order to argue that while habits are difficult to break, it does not follow that habitual behavior is nonautonomous. As he saw it, addictions may impel behavior but do not compel it, and while they may serve to constrain autonomy to some extent they do not deprive people of autonomous choice. On this basis, Husak criticized attempts to justify drug criminalization based on analogies between addiction and Mill's example of voluntary slavery (discussed in Section 1.3) as being based on a misunderstanding of how addiction functions.

In subsequent work, Husak (2003) argued that “[t]he best reason not to criminalize drug use is that no argument in favor of criminalizing drug use is any good—no argument is good enough to justify criminalization” (p. 23). To support this point, he challenged two assumptions that he perceived as underlying every argument for criminalization, namely that drug use is dangerous and that criminalization reduces use. Husak believed not only that “the dangers of illicit drugs tend to be grossly exaggerated” but also that the dangers of drug use are presently more severe than they need to be, because “illicit drugs would be less dangerous in a world in which production and sale had been decriminalized” (p. 26). Furthermore, Husak believed that there is good reason to doubt that decriminalization would lead to significantly increased use. He quoted statistics demonstrating no correlation “between the frequency and severity of punishment and trends in drug use” in the United States and found that “data from other parts of the world provide better evidence for an inverse than for a positive correlation between severities of punishments and rates of illicit drug use” (p. 27). In order to explain this inefficacy of the criminalization regime, he pointed to the ‘forbidden fruit’ effect, where adolescents in particular may be enticed to drug use because it is perceived as dangerous. Finally, even if decriminalization does lead to increased use of currently illegal drugs, this may entail a corresponding decrease in the use of alcohol and tobacco, thereby decreasing the overall harm from drug use to society.

In a later article, Husak (2007) argued that much of the resistance to drug decriminalization rests on a failure to distinguish between the questions of whether it is advisable to use drugs and whether the state is justified in punishing people for drug use. Even if the answer to the first question is negative, this would not in Husak's opinion provide justification for drug criminalization. However, Husak believed that the case against drug use because of the risk of health complications is considerably weaker than what is commonly assumed. He quoted statistics showing that far more people die from prescription medication, tobacco, and alcohol than from illicit drugs, even if we control for the number of users. Thus, “[i]f the punishment of drug offenders is designed to prevent persons from risking their lives, our society has criminalized the wrong substances” (p. 241). Furthermore, Husak

also showed that far more people in the United States die from causes linked to obesity than from drug use. Thus, he concluded, there is no basis for criminalizing drug use as a particularly dangerous activity:

The only conceivable basis for treating illicit drugs differently from other recreational activities is that the former are more risky, by a substantial degree, than the latter. But illicit drug use is *not* more risky than any number of these behaviors (Husak, 2007, p. 251; emphasis in original).

In this article, Husak also introduced a new argument linking drug criminalization to increased drug use. According to this argument, criminalization increases the probability that convicted offenders will return to drug use after they have served their sentence:

those drug offenders who are convicted and incarcerated must eventually be released. Because of the long sentences frequently imposed on them, these persons are less able to find employment, or housing, or to re-establish ties with their families. As a result, they are more likely to resort to deviance – including subsequent drug use (Husak, 2007, p. 249).

Husak's case against the drug criminalization regime started with his 1992 principled position that as long as illicit drug use is not exceptionally harmful as compared to the use of alcohol and tobacco as well as other recreational activities, people have a moral right to use drugs. By citing evidence indicating that illicit drug use is less dangerous than commonly assumed, he thus challenged the paternalistic basis for drug criminalization. He did not address the putative detrimental effect from illicit drug use on mental health, however, which is often cited as a concern by proponents of drug criminalization. His argument that drug criminalization does not decrease – and may increase – drug use could be seen as a utilitarian criticism of the legitimacy of the criminalization regime on the basis that it is actually not helpful for its primary goal.

2.4 Peter de Marneffe (1996, 2003)

The philosopher de Marneffe (1996) argued that laws restricting heroin and cocaine use, although not necessarily wise, are not unjust since they do not sacrifice the autonomy of individuals in a morally objectionable way. While acknowledging that psychedelics drugs such as LSD and peyote have sometimes been found to promote mental and spiritual development, he argued that heroin and cocaine could not reasonably be said to promote such development and that the recreational value of their euphoria-producing effect was not sufficient to support a right to use these drugs given that they also cause substantial harms to social welfare. De Marneffe based this assessment on what he called the standard argument for drug control laws:

The easier heroin and cocaine are to get, the more people will use them. The more people use heroin and cocaine, the more people will abuse them – or use them in ways that have bad consequences for them and their families. Laws against the production, distribution and possession of these drugs make these drugs harder to obtain and so reduce drug abuse. If these laws were repealed, drug use would increase dramatically and, with it, drug abuse. These laws have costs. When enforced they clog the criminal justice system with drug law violations; they create a black market in drugs which gives rise to organized crime, which in turn gives rise to street violence and police corruption; they cost money to enforce; they make drug use itself less safe; and they impose criminal penalties on a recreational activity that many people enjoy. Still, the benefits in reduction of drug abuse are worth these costs (de Marneffe, 1996, p. 229).

He found that if this standard argument is reasonable, neither Rawls', Dworkin's or Scanlon's conceptions of moral limits to the policies of democratic government would deny the legitimate criminalization of heroin and cocaine. He concluded that there is no right to use these drugs based on autonomy concerns.

In a later work, de Marneffe (2003) argued against the legalization specifically of heroin on a paternalistic basis, positing that heroin use has such strongly negative consequences for users that the cost of legal heroin use would dwarf the costs of heroin criminalization. He further argued that by harming themselves through heroin use, such users would also harm their social surroundings, for instance by providing inadequate parenting. According to de Marneffe, therefore, heroin use causes harm to others via harm to self. This might be understood as a position that draws upon Mill while challenging his distinction between harm to self and harm to others.

In presenting this argument, de Marneffe acknowledged a range of assumptions his case builds on. Chief of these is the "premise that drug use would increase in the absence of drug control laws" (p. 34). De Marneffe expressed strong confidence in this premise, basing his confidence on an analysis of both the motivations for drug use and on the consequences of drug legalization:

People use drugs because they are pleasurable, and because they are an effective antidote to anxiety, frustration, and feelings of inadequacy. Were drugs legal, they would be socially destigmatized and they would become easier to acquire, cheaper to purchase, and safer to use. Given the genuine psychological benefits of drug use, we can be sure that it would increase were drugs legalized (de Marneffe, 2003, p. 34).

Having thus concluded that drug legalization would increase use, de Marneffe argued that legal heroin would have a strongly negative impact especially on young people in poor communities, whose lives are particularly difficult and who are, therefore, more vulnerable to heroin abuse. He held these negative consequences of legal heroin up against possible positive consequences, related

for instance to a decline in alcohol use, as well as the many negative side effects entailed by criminalizing heroin, among which he counted the strengthening of criminal groups, gang violence, and a greater risk for overdoses. Nevertheless, working from the assumption that gang violence can be kept at what he called “acceptable levels” through efficient policing, he concluded that heroin criminalization is necessary to protect especially young people in poor communities.

De Marneffe’s standard argument for drug control laws posits that drug legalization would lead to increased use and therefore to increased abuse, but also recognizes that drug criminalization incurs substantial societal costs. His second article implicitly assumed that the level of heroin abuse in a community is independent from the level of social misery in that community caused, for instance, by increasing gang violence. Although he maintained that heroin abuse is caused by difficulties in life, his weighing of the costs and benefits of heroin criminalization assumed that the costs incurred from criminalization in the form of increased gang violence would not have any consequences for the extent of future heroin use.

2.5 Paul Smith (2002)

In this article, Smith reviewed a range of arguments for and against drug criminalization, concluding that the case for criminalization is not convincing. Using Feinberg’s (1984, 1988) analysis of liberty-limiting principles to assess the arguments defending drug criminalization, he identified the issue of causing harm to oneself and to others as well as moralistic concerns as bases for such arguments. In addition, he also discussed arguments against criminalization based on the right to personal liberty, and utilitarian arguments for and against criminalization.

With regard to the harm principle, Smith found that one could argue for direct harm to others in the form of violence, or for indirect harm caused by harming oneself. He observed that alcohol is strongly linked to violence, while drugs such as cannabis, opiates, and MDMA tend to reduce violent behavior, and if there is a case for criminalizing a drug because it leads to violent behavior, this should therefore apply primarily to alcohol. As for indirect harms, he did not dispute that drug use may be harmful for oneself and thus for one’s dependents and possibly other people, but quoted statistics to show that this harm was comparable to that of alcohol and tobacco. Furthermore, he argued that the same levels of harm pertained to dangerous sports and unhealthy lifestyles and diets. Besides challenging the paternalistic basis for drug criminalization on factual grounds, by denying that drug use is exceptionally harmful, Smith also argued that such paternalism is illegitimate because amounts to treating people like children.

When it came to arguments for drug criminalization based on moralistic concerns, Smith discussed the Kantian notion of a duty to oneself, the perfectionist argument that drug use is stupefying, dehumanizing, and degrading, and the argument from traditional values. According to the argument from Kantian duty, it is wrong to undermine one's rationality and autonomy, and since drug use has this effect, it is morally wrong. Smith observed, however, that the argument applies equally to alcohol and tobacco, which are both addictive and therefore (according to this argument) undermine autonomy. As for rationality, "we know it dissolves in alcohol" (p. 238). A further problem with autonomy-based arguments, he found, is that while they may support the immorality of drug use, they oppose its criminalization. To the perfectionist argument, Smith replied that "there is reasonable disagreement about ideals of human excellence and of the good life," and that it is not the state's task to enforce any one such ideal (p. 238). Finally, he dismissed the argument from tradition, which condemns practices that deviate from the traditional way of life, on the grounds that it "presupposes the rightness of the tradition" (p. 239).

To Smith, the case against drug criminalization was based first and foremost on the moral right to personal liberty, which he defended with references to Mill. He observed that adults in liberal societies "have a right to do risky things such as smoke cigarettes or engage in dangerous sports", and that criminalization of such activities would be "an intolerable infringement of liberty" (p. 234). Secondly, Smith also discussed a number of utilitarian arguments against drug criminalization. He started with observing that drug use clearly has value for some people, making criminalization a harm to welfare for those who can use drugs safely. Furthermore, he found that criminalization might turn drugs into 'forbidden fruit' and therefore serve to make them more attractive to some people. To his mind, criminalization is also "futile and brings the law, the police and government into disrepute", and the lucrative nature of trade in illicit drugs breeds criminal activity (p. 241). By raising drug prices, criminalization also forces habitual users into criminal activity to finance their addiction, and this leads to expanding drug markets since the easiest way to make money for one's own drug use is to profit from sales to others. To increase profits, cynical drug sellers adulterate their wares, thereby increasing the danger of drug use, and offer drugs to children. Compared to the utilitarian argument for drug criminalization – that criminalization discourages drug use by threatening punishment, raising prices, reducing availability, and providing clear guidance to potential drug users – Smith found that the argument against criminalization was clearly weightier. He concluded that the current drug laws are unjustified.

We can understand Smith's article as first challenging the moralistic, paternalistic, Millian, and Kantian bases of legitimacy of drug criminalization, and then subsequently challenging drug criminalization for its damaging consequences for society. Although he quoted some research

findings to support his argumentation, several points were not supported by evidence and could be regarded as assumptions. This applies particularly to his arguments that violence is associated more strongly with alcohol than with illicit drugs, and that alcohol is at least as detrimental for rationality as illicit drugs. Smith also posited without evidence that the risk associated with drug use is comparable to the risk associated with engaging in dangerous sports. His utilitarian arguments against drug criminalization assumed, in a similar way to Richards (1981) above, that decriminalization would not increase drug use to the extent that the overall societal impact would be worse than under criminalization

2.6 Lester H. Hunt (2003)

This article by Hunt was written as an epilogue to a symposium he chaired on drug legalization that included previously discussed contributions by Husak (2003) and de Marneffe (2003), as well as one by Sher (2003) that will be discussed below. In the epilogue, Hunt introduced one argument that the other contributors did not consider, namely that “drugs can make a significant contribution to human flourishing” (p. 48). He posited that we should understand drugs as a technology for mood adjustment, which “helps to free us from the tyranny of our moods [and] thereby contributes to our well-being” (pp. 47–48). Therefore, to describe drugs “merely as recreational is to trivialize them misleadingly” (pp. 46–47).

Hunt acknowledged that this putative capability drugs have to enhance our positive liberty – that is, our capacity to flourish as human beings – may be criticized on the issue of addiction, which is clearly a constraint on positive liberty. He found that

this objection probably captures one of the reasons why drug laws exist. Such laws represent a Rousseauian attempt to force people to be free: drug laws take away some negative liberty (through government coercion) in order to enhance positive liberty, by increasing the extent to which people possess the control over their own lives that only an [sic] non-addicted person can have (Hunt, 2003, p. 48).

It may seem, therefore, that addictive drugs have the capacity to both contribute to and detract from our positive liberty. Hunt pointed out, however, that not all psychoactive drugs are strongly addictive, and that their addictiveness depends on the usage pattern and on the characteristics of the individual user. Finally, Hunt discussed a different type of objection to his point about drugs as positive liberty enhancers, namely that some people will insist that intoxication or inebriation from drug use has no value at all, but rather serves to obliterate qualities like self-control and mental

lucidity that are essential to our happiness and dignity. He did not argue against such a view, but observed that

the debate about the permissibility of using drugs rests in part on precisely such differences in point of view. It depends to a significant extent upon disagreements about what things are worth pursuing, about the content of the human good (Hunt, 2003, p. 49).

While this contribution from Hunt clearly favored the position against drug criminalization, he did not explicitly weigh in on the issue of criminalization. His discussion was careful to note the dangers of overgeneralization regarding the effects from different drugs, but also assumed that all psychoactive drugs have an effect on mood. This is probably untrue, since cognitive enhancement drugs primarily affect cognition rather than mood. Furthermore, his concluding remark seems to assume that the debate about drug use relies, at least in part, on intractable normative disagreement about the value of drug-induced altered states of consciousness. It may seem possible, however, that an accumulation of knowledge about such states would help to clarify their evaluation.

2.7 George Sher (2003)

In a succinct defense of drug criminalization, Sher presented three arguments that he labeled the paternalistic argument, the protective argument, and the perfectionist argument. He based the paternalistic argument on observing the addictive effects of heroin, the increased risk of heart attack from using amphetamines and cocaine, the brain damage incurred by ecstasy use, and the ability of LSD to trigger lasting psychosis. Because of this range of damaging effects, Sher found that “one obvious reason to continue to criminalize these drugs is simply that many persons deterred by the law from using them will thereby be spared serious injury” (p. 30). The protective argument continued from this position, stating that drugs harm others as well as the user, while the perfectionist argument posited that drug use not only harms the user, but also prevents the user from living a good life:

Most would agree that it is bad when people stumble through life with a blurred and distorted view of reality; bad when they cannot hold a thought from one moment to the next or follow a simple chain of reasoning; bad when they drift passively with no interest in pursuing worthwhile goals; and bad when they care more about the continued repetition of pleasant sensations than about the needs and interests of those who love and depend on them (Sher, 2003, p. 31).

Sher did not refer to any scientific literature that documents the representativeness of this depiction of the negative effects from drug use, apparently considering the commonality of such debilitating

consequences a matter of general knowledge. He acknowledged that the same arguments could be used to justify the criminalization of alcohol, but found that the present harm level from legal alcohol lies below a crucial (but not specified) threshold, whereas the combination of legal alcohol and drugs would exceed the threshold:

The reason for treating drugs and alcohol differently will be that we can hold the relevant harms and bads below the threshold by legally permitting one or the other but not by permitting both; the reason for continuing to criminalize drugs but not alcohol will be that this is easier and less costly than switching (Sher, 2003, p. 33).

In sum, Sher believed that drug criminalization can be defended from a paternalistic perspective, from a concern for harm to others, and from a concern with drug users' cognitive function that is largely paternalistic, but which also approaches the Kantian demand for personal independence. His line of argumentation was built on a range of assumptions, however. First of all, he assumed that drugs use has mostly negative consequences, and implicitly that the harms incurred are far worse than the harms from other recreational activities. Furthermore, while the paternalistic argument acknowledged a range of different consequences from different psychoactive substances, the protective and perfectionist arguments assumed that all such substances have similar consequences for users' social surroundings and for their ability to live a good life. His arguments also assumed that these consequences are not affected or impacted in any way by the legal status of the substances, and that any decriminalization or legalization of these substances would increase their use, and thereby increase also the negative consequences resulting from use. Finally, Sher assumed that the societal harm level from alcohol use is comparable to the harm level from illegal drug use, and held that considerations related to practicality supported the continuation of legalized alcohol use and criminalized drug use.

2.8 Jonny Anomaly (2013)

Contrasting the legal regimes for recreational drugs and antibiotics, Anomaly found that we should "stop wasting resources trying to fight an unwinnable and morally dubious war against recreational drug users" (p. 752) and shift our attention instead to the problem of antibiotics misuse. His case against the drug war focused on how drug use, unlike the misuse of antibiotics, does not really cause harm to others. He noted that there is little evidence to support the notion that drug use in itself leads to violence, and that the substance most closely associated with violent behavior is alcohol. However, he found that the criminalization of drugs clearly causes harm to non-users as it forces habitual drug users into criminal activities and breeds police corruption:

Although many have argued that recreational drug use harms non-users, most of the harm associated with these drugs—such as theft and murder—is caused not by *drug use*, but rather by the enforcement of *laws that prohibit drug use*. These laws create the conditions for black markets to flourish, for violence to be used as a preferred method of contract enforcement, and for police corruption to thrive (Anomaly, 2013, p. 752; emphasis in original).

Anomaly admitted that drug addicts, who according to research constitute only a small percentage of all users, might neglect and alienate loved ones in the pursuit of their addiction, but found that this is just one of many ways in which people disappoint or harm their friends and relations. Moving beyond the issue of harm to others, he also criticized the notion that decriminalizing drugs would increase use. Pointing to the situation in Portugal, he maintained that the evidence does not support this notion of a substantial rise in drug use after decriminalization.

By focusing on harm to others as the basis for criminalization, Anomaly implicitly placed his argumentation in the Millian tradition. His point about the impact of decriminalization on drug use may seem to assume that the case of Portugal is generalizable and that a small increase in drug use after decriminalization is not sufficiently problematic to justify continued drug criminalization.

2.9 J. Angelo Corlett (2013)

Corlett defended drug criminalization on a basis of the value of responsibility. Arguing that (illegal) drug use entails a threat of wrongful harms to others as well as costs related to health care and rehabilitation, Corlett maintained that responsible drug legalization would necessitate establishing a drug tax that could cover the costs for liability insurance. However, “this insurance would make drugs unaffordable to users as the liability limits (to be fair) must range into the several millions of dollars in order to cover cases of drug-related DUI wrongful death or manslaughter cases” (p. 239).

According to Corlett, then, adequate liability insurance would necessarily raise drug prices to exorbitant levels, thus forcing most users back to the black market. The responsible legalization of drugs is, therefore, impossible. Corlett acknowledged that this principle of liability insurance would apply in equal measure to alcohol, which would also need to be taxed at very high levels, and would therefore similarly end up as a black-market commodity:

Lacking solutions to [the] fundamental affordability problems of legalization, it is suggested that until such legalization can be effected responsibly, such drugs, and even alcohol and certain other dangerous (to others) activities, ought to be prohibited (Corlett, 2013, p. 242).

In other words, the principle that the users themselves should take full responsibility for the harms caused by their drug and alcohol use entails that such use should be taxed at appropriate levels, which would make drugs and alcohol prohibitively expensive. Users would therefore refuse to pay the liability insurance and return to tax-free shopping on the black market, and the legalization project would collapse.

We can understand Corlett's approach to the defense of drug criminalization as a concern with constructing social conditions that allow for human excellence. His argument differed substantially from those of Sher (2003) and de Marneffe (2003), but built on similar assumptions. While Corlett singled out cocaine, heroin, and methamphetamine as addictive drugs, he made no such distinctions when discussing wrongful harms to others, costs of rehabilitation, and so forth. The underlying assumption thus seems to be that such costs are comparable for all types of drugs (including alcohol). Furthermore, he apparently assumed that the consequences of drug use in terms of wrongful harms to others are not affected by the legal status of the drugs. Although it is possible that he would maintain his principled position that drug users must take full responsibility for their drug use regardless of what consequences drug criminalization might incur, his argumentation was based on concern for protecting non-users from the negative consequences of drug use. If these consequences are actually increased because of the policy his argument supports, Corlett's position might appear to become untenable.

2.10 Rob Lovering (2015)

In this book, Lovering analyzed arguments for seeing recreational drug use as morally wrong and concluded that they are generally unpersuasive. He was careful to distinguish the moral question from questions of prudence or legality, although he acknowledged that these questions are also connected. Reviewing previous assessments of the drug criminalization regime, he found that supporters of the regime commonly based their view on explicit or implicit condemnations of the morality of drug use. A challenge for his project of evaluating the arguments supporting this perceived immorality, however, was that the proponents of such moral censure often neglected to provide any justification for their view, presenting the immorality of drug use rather as a brute fact. Nevertheless, Lovering identified a range of justifications for the moral censure of drug use based on harm to self, harm to others, religious concerns, and other concerns.

Starting with harm to self, Lovering observed on a general basis that we do not usually condemn unhealthy activities such as the consumption of sugary beverages or junk food as morally impermissible. Intrinsically debilitating activities such as suicide may qualify as exceptions, but

Lovering reviewed the available evidence and concluded it would be very difficult to maintain that illicit drug use qualifies as such. Indeed, the evidence indicates that illicit drug use is often less harmful than the use of alcohol and tobacco. He also found that harm to others for the most part seems related either to violence between rivaling organized crime groups or to habitual users trying to raise money for drug use, and is therefore arguably a consequence of the drug war rather than of drug use as such. Lovering cited evidence indicating that alcohol intoxication is more strongly associated with violence than intoxication from illicit drugs.

Moving beyond arguments related to bodily harm, Lovering noted “the powerful role that religion seems to play in the moral condemnation of recreational drug use” (p. 149). He quoted a number of Bible verses warning especially against immoderate alcohol use (but also against the use of ‘mixed wine’), often in a context of spiritual harm. As a philosopher, he found warnings of spiritual harm difficult to assess without also evaluating underlying religious claims for instance about the existence of God, and he noted also that such warnings tend to be specific to a given religious tradition, and that the Biblical examples were prudential rather than moralistic in nature. Besides these religiously based concerns, Lovering also discussed a range of concerns that apply both to licit and illicit drug use, including the possibility that addiction degrades autonomy and that intoxication degrades rationality and morality.

Lovering’s work on the morality of drug use can be seen as a challenge to the moralistic basis for drug criminalization. In addition, his discussions of harm to self and others, which were both well founded in empirical research, challenged paternalistic and Millian bases for criminalization. However, his discussion of religious concerns ended in an attempt to assess underlying ontological claims that would probably often seem unpersuasive and irrelevant to people belonging to the relevant religious traditions.

2.12 Ezra Sullivan and Nicanor Austriaco (2016)

Using a Thomistic framework to analyze the ethical merits of recreational cannabis use, Sullivan and Austriaco found that such use cannot be justified. Citing pharmacological research literature, they claimed that cannabis use harms the organic functioning of the human body, impedes cognitive functions, and is associated with psychosis. Furthermore, they found that cannabis use could be distinguished from alcohol use because cannabis use always leads to intoxication, whereas alcohol can be consumed in moderation without intoxicating the user. This was based on the observation that “[i]ntoxication from alcohol is usually called ‘drunkenness,’ while intoxication from a drug is often called a ‘high’” (p. 163), and “‘to get high’ is, in our assessment, the same as ‘to be

intoxicated” (p. 165). Intoxication, for Sullivan and Austriaco, is the result of “excessive use of an intoxicant, such that the user is deprived of reason” (p. 163), causing “a person’s rationality to be obscured or abandoned” (p. 164). They understood rationality in an Aristotelian perspective as a part of our human essence, encompassing not only “calculation” but “the use of wit, of imagination, of memory, of contemplation, of meditation, of prudential deliberation” (p. 164), and thus concluded that the effect from intoxication on rationality is highly problematic. Since cannabis use always involves intoxication, such use therefore causes grave damage.

At the end of their article, Sullivan and Austriaco changed their focus somewhat, engaging in a critique of the putative spiritual value of drugs. Their reading of Pollan (2016) understands his text to claim that “drugs can be used to gain enlightenment”, which they counter with the statement that “[i]f we try to reach God, the ultimate reality, through the magical key of drugs, we will find that we have only locked ourselves into a dungeon of our own making” (p. 167). They conclude that “[d]rugs, including the recreational use of marijuana, dull and destroy human flourishing” (p. 168).

There is a number of unsupported assumptions in Sullivan and Austriaco’s argumentation, most of which relate to conflated concepts. One of their major points was that cannabis use is always related to intoxication, whereas alcohol can also be used in a moderate form that does not involve intoxication, which distinction they supported with a reference to the language used to describe the state of cannabis intoxication. It would seem possible, however, that cannabis could be used in moderate doses comparable to that of drinking a few beers, or even in light doses comparable to a few sips of an alcoholic beverage. Sullivan and Austriaco also conflated the sort of cognitive functions that may be negatively affected by cannabis with the broader Aristotelian notion of rationality, assuming that impairments to working memory and mental processing speed translate to a more general impairment of imagination and wit. Furthermore, they assumed that negative long-term consequences identified in research of chronic cannabis use are directly relevant for every form of cannabis use, while making no similar assumption for the debilitating consequences of chronic alcohol use on moderate users; the inconsistency seems related to their assumption that cannabis can only be abused, while alcohol can be either used or abused.

2.13 Timothy Hsiao (2017, 2019)

Hsiao (2017) argued that recreational drug use is immoral because of its deleterious effects on cognitive function or rationality, which is an essential foundation for morality. According to Hsiao, we have a duty to reason well in order to maintain our capacity for moral functioning, and it is therefore wrong to engage in activities that unnecessarily diminish cognitive functioning. Since drugs such as

psychedelics, opiates, cannabis, and alcohol diminish – at least to some extent – our cognition, the unjustified use of these drugs is immoral; and while recreation is important for us, our need for recreation may be fulfilled in many ways that do not impede cognition. In conclusion, he found that the recreational use of such drugs is wrong.

In a similar argument, Hsiao argued that “our exercise of autonomy flows from our rationality” in the sense that “[d]ecisions can be autonomous only if they are made by an agent whose cognitive faculties are working in a certain way” (p. 612). A liberal state that respects autonomy therefore has an interest in curbing recreational drug use that diminishes cognitive function and the ability to make autonomous choices. To defend the feasibility of drug restrictions, Hsiao pointed to the earlier success of prohibition in reducing alcohol consumption.

We can understand Hsiao’s arguments in a Kantian framework, with recreational drug use entailing an abdication of moral duties. Seeing rationality as the basis of morality and autonomy, Hsiao could argue that intoxication is by definition immoral since it diminishes moral capacity. In principle, this would seem to apply to any degree of intoxication that is not justified by something more important than a need for recreation. However, while Hsiao pointed to some possible effects from the use of various drugs that might appear to impair cognitive function, he did not attempt to show that these are common or typical effects from these drugs, or that the kind of cognitive impairment they may cause is truly an impairment also to morality and autonomy.

In a subsequent article, Hsiao (2019) defended cannabis prohibition on the supposition that cannabis suppresses cognition and memory in such a way that “marijuana legalization is incompatible with individual liberty” (p. 17). In order to protect the conditions for individual liberty, the state must restrict substances that impair these conditions, which means it must restrict cannabis:

Prohibition would restrict marijuana to a maximal degree, thereby minimizing any harms to individual liberty that may result. Prohibition subjects drug transactions to legal sanction, thereby making drugs more difficult to obtain and therefore more expensive. This combination of higher prices and reduced availability in turn reduces drug use. It is simply a matter of supply and demand: the more difficult it is to obtain something, the more expensive it becomes (Hsiao, 2019, p. 19).

Hsiao acknowledged that substances such as cannabis are not necessarily unique in undermining the conditions for individual liberty, but distinguished between psychoactive drugs and other substances on the basis of the motivation underlying their use: whereas drugs “are primarily used for the purpose of seeking a pleasurable experience through impaired cognition,” (p. 21), other substances

that may have a similar effect on cognition are used for different reasons. His rationale for this distinction is especially noteworthy when it comes to alcohol:

Alcohol is commonly consumed as a mild social lubricant without the intention to get drunk. Hence, while alcohol should be regulated, it need not be done with the stringency of prohibition. But this is not true of marijuana, as the whole point of most marijuana use is to get high. Nobody, after all, smokes a joint, wanting to avoid the high. Thus, unlike alcohol, marijuana's paradigmatic use is abuse (Hsiao, 2019, p. 23).

Hsiao did not support these claims about differences in motivations for use on any empirical evidence. His argument assumed that an intention to get intoxicated could be equated with abuse, and that the differences in the use of the words 'drunk' and 'high' entail that cannabis is not normally consumed in moderate or light doses. Furthermore, like Sher (2003) and de Marneffe (2003) above, Hsiao assumed that drug use – in this case specifically cannabis use – has predominantly negative consequences. Working from the assumption that the paradigmatic cannabis use is abuse, he further assumed that the consequences of cannabis use cannot meaningfully be separated from the consequences of cannabis abuse. Finally, and again like Sher (2003) and de Marneffe (2003) above, Hsiao assumed that drug legalization would lead to increased use.

2.14 Bioethicists and Allied Professionals for Drug Policy Reform (2021)

In an article penned by Earp et al. (2021), this alliance of bioethicists and other professionals argued against drug criminalization on a basis especially of racial justice. They found that while the war on drugs is nominally intended "to protect people from harm and promote public health", it has in practice "worsened many aspects of public health while inordinately harming certain racialized communities" (p. 4). Seeing the drug war as having explicitly racist origins, they argued that this racism in the drug criminalization regime has continued into the present day, and is particularly blatant in how Black and Hispanic men in the United States are more often met with police use of force, are more likely to face arrest, prosecution, and conviction, and when convicted, face harsher penalties, all of which is well documented in research literature. Furthermore, the same racial disparities are found in other countries, with one example being how Black people were almost nine times more likely to be searched for drugs in England and Wales in 2016/2017.

Drug criminalization is also problematic in the sense that it harms users with regard to disease transmission, social stigma, and by discouraging users from seeking medical help. The criminalization regime has led to human rights abuses especially in countries in the Global South, and is generally criminogenic:

Drug prohibition, like alcohol prohibition, is criminogenic and can therefore be harmful to both users and non-users; it can motivate users to commit burglaries and robberies in order to purchase drugs; it contributes to systemic violence; it is associated with corruption in the criminal justice system; it diverts law enforcement efforts away from solving predatory crimes and arresting their perpetrators; and it can contribute to a cycle of ongoing criminal behavior for those who hold criminal records for trivial drug related offenses (Earp et al., 2021, p. 7).

Furthermore, Earp et al. (2021) argued that drug criminalization violates the rights of people who want to use illicit drugs for positive reasons. Quoting findings especially from recent research on psychedelics, they argued that “people may use drugs to examine their consciousness, to explore their character, to access and respond to their values, motivations, and desires, and to engage in self-development and self-understanding” (p. 9), and that the criminalization regime violates their legitimate right to do so. In conclusion, they called “for the immediate decriminalization of all so-called recreational drugs and, ultimately, for their timely and appropriate legal regulation” (p. 4).

We can understand the position of this alliance as being based (implicitly) on Kantian notions of sovereignty. Their main objection against the war on drugs was that it is implemented with a clear racial bias, thereby violating the sovereignty especially of Blacks and Hispanics. By using this argument as a main basis for calling for an end to the criminalization regime, they may be seen to assume that it is not possible to reform the police and criminal justice system in order to continue the drug war without the racial bias. Their argument about the right to use drugs as tools to explore one’s inner world and engage in self-development may also seem to assume that such a sovereignty-boosting effect is not outweighed by a sovereignty-reducing effect related to addiction and pacification.

2.15 Analytical overview of arguments and assumptions

In the above range of arguments for and against drug criminalization, we have seen that some points were argued explicitly while other, sometimes more fundamental points, were included in the argumentation on a more implicit basis. This section will attempt to provide a brief analytical overview of the main arguments and assumptions. Note that, for completeness, this overview includes perspectives from non-philosophers that have not been reviewed above (these reviews are included in the forthcoming complete version of this text).

For the most part, both arguments and assumptions tended to relate to the consequences either of illicit drug use or of the criminalization and legalization policies. However, some arguments were, at least in principle, unrelated to consequences. One example was the *libertarian* argument offered by

Friedman (1972), according to which governments have no right to interfere in an individual's drug use. Husak (1992) supported the similar argument that individuals have a moral right to use drugs recreationally, although he acknowledged that this putative right – denied by de Marneffe (1996) for heroin and cocaine – was not fully separable from the consequences of drug use, since there might exist drugs that are too harmful to be protected by such a moral right. Nadelmann (1992) more generally regarded drug criminalization as being incompatible with values such as tolerance, privacy, individual freedom, and individual responsibility, and Bone (2020) identified tensions between the drug war and the human rights to health and freedom of religion. I will refer to this collectively as the *civil rights* argument. Others pointed to Millian *liberty* or Kantian *sovereignty* as principles that appear to be incompatible with criminalization (Anomaly, 2013; Cudd, 1990; Richards, 1981; Smith, 2002) or with intoxication (Hsiao, 2017). Corlett (2013) for his part defended drug criminalization on the basis of the principle of *responsibility*.

Furthermore, drug use was sometimes seen as immoral on the basis of implicit or explicit religious concerns that were related to perceived spiritual harms (Sullivan & Austriaco, 2016; Wilson, 1990). Richards (1981) regarded religious objections to drug use as being informed by concerns over non-conformity to religious tradition related to the heterogeneous spiritual or mystical experiences that are sometimes induced by cannabis or psychedelic drugs. It might be noted that from a religious point of view, non-conformity to a specific religious tradition may be perceived as incurring spiritual harm. I will refer generally to arguments based on religious concerns as *religious orthodoxy* arguments. There was also the perception that defenders of the drug war sometimes regarded illicit drug use as immoral without needing or providing any justification (Husak, 1992; Lovering, 2015), which implies that such drug use is or should be universally condemned and constitutes a 'core crime'. Although this argument was never explicitly supported in the reviewed works, I will briefly discuss it below as the *universal condemnation* argument.

On a more straightforward consequentialist basis, arguments for drug criminalization usually started out from the argument (or assumption) that illicit drug use is highly dangerous to users (e.g., de Marneffe, 2003; Kaplan, 1988; Lawn, 1990; Sher, 2003). In subsequent discussions, I will refer to this as the *grave danger* argument. This argument was sometimes related to a concern for danger to rationality, autonomy, and morality (e.g., Hsiao, 2019; Sher, 2003). Several of these defenders of the criminalization regime also extended this argument to the claim that *drug use harms others*, for instance with regard to violent crime (Lawn, 1990) and poor parenting (Wilson, 1990). A second common point was that decriminalization would result in substantial increases in drug use, which I will refer to as the *criminalization curbs use* argument (e.g., de Marneffe, 2003; Kaplan, 1988; Lawn, 1990). A related point, which was not usually recognized as an argument or an assumption at all, was

that an increase in drug use would entail an increase in drug abuse. In other words, it was assumed that the extent of drug abuse is directly proportional to the extent of drug use, independently of other factors. I will refer to this as the *use-abuse proportionality* argument. This argument was sometimes extended into a *use-abuse equivalence* argument that saw no distinction between the use and abuse of illicit drugs, maintaining instead that every form of use is abuse (Hsiao, 2019; Sullivan & Austriaco, 2016). Kaplan's (1988) prediction of increasing drug abuse post-legalization was related to an argument of (American) *cultural or societal unreadiness* with regard to the task of handling drugs responsibly. Lawn (1990) for his part assumed that the alternative to criminalization would be a form of *radical legalization* that would allow even children to buy drugs. He also argued that legalization would *violate international obligations* and *send the wrong message* to adolescents. Finally, Sher (2003) supported the pragmatic argument that while illicit drug use may not be more harmful than the use of alcohol, it would be difficult and costly to reverse their respective legal status. I will refer to this argument as the *practicality* argument.

Consequentialist arguments against drug criminalization usually started out by challenging one or more of the above range of arguments in favor of criminalization. The *criminalization curbs use* argument was countered by the argument that *criminalization is ineffective* (e.g., Anomaly, 2013; Coyne & Hall, 2017; Global Commission on Drug Policy, 2011; Husak, 2003; Kurzman & Magell, 1977; Smith, 2002), which was sometimes extended to the argument that *criminalization increases use* (Bourgois, 2015, 2018; Friedman, 1972; Husak, 2007). One interesting variation of the *criminalization is ineffective* argument was Nadelmann's (1992) and Miron and Zwiebel's (1995) acknowledgement that while legalization might entail moderate increases in prevalence, these increases would mainly reflect casual rather than heavy use and would be compensated for by decreases in alcohol and tobacco use. Furthermore, it was common to point to a range of *unintended negative consequences* from drug criminalization both to society and to drug users themselves (e.g., Christie & Bruun, 1985/2003; Coyne & Hall, 2017; Friedman, 1972; Hari, 2015; Miron & Zwiebel, 1995). The societal version of this argument pointed most commonly to the criminogenic effects of drug criminalization, while negative consequences for drug users involved stigmatization, dangers from harmful adulterants, and more unhygienic drug use serving to increase the transmission of infectious diseases. One objection to the *grave danger* and *drug use harms others* arguments was, therefore, that drug criminalization itself is to blame for a large part of the danger incurred by drug use, which I will refer to as the *criminalization exacerbates danger* objection (Hari, 2015; Lovering, 2015; Nadelmann, 1992). The *grave danger* argument was otherwise countered with the argument that the danger from drug use is comparable to many other accepted risky activities, which I will refer to as the *exaggerated danger* objection (e.g., Gerber, 2004; Husak, 1992; Smith, 2002; Hari, 2015). As a

corollary to this objection, it was sometimes maintained that the risks of using illicit drugs have been exaggerated because of an inherent suspicion towards the ethnic groups who have historically tended to use these drugs, which I will refer to as the *criminalization is racist* argument (Coyne & Hall, 2017; Earp et al., 2021; Gerber, 2004; Richards, 1981). Another perceived basis for supporting continued drug criminalization was identified as law enforcement agencies' struggles for *funding and turf* (Coyne & Hall, 2017; Gerber, 2004) or, more generally, with a societal preference for using drug problems as a scapegoat for wider and more complex socioeconomic problems (Christie & Bruun, 1985/2003). Along with Richards' (1981) argument about *religious orthodoxy* as a basis for criminalization, these two arguments claim that criminalization is based on illegitimate grounds, and will be referred to collectively as the *criminalization is illegitimate* argument. Finally, a further extension of the *exaggerated danger* objection maintained that, in moderation, illicit drug use might serve as an overall contribution to human well-being and flourishing, which I will call the *positive drug use* argument (Earp et al., 2021; Hunt, 2003; Miron & Zwiebel, 1995).

Chapter 3: Analysis and discussion

The present chapter presents the overall conclusions from the arguments and evidence discussed and assessed in previous chapters. These conclusions are sectioned over two stages, with Section 3.1 returning to the literature reviewed in Chapter 2 and Section 3.2 thereupon returning to the framework of criminalization theoretic perspectives from Chapter 1. The analyses are structured so as to minimize repetitions, although the criminalization theoretic assessment in Section 3.2 is often contingent upon the assessment of arguments in Section 3.1 and frequently refers to or briefly reiterates previous discussions. In the full version of this text, the discussions in this chapter are informed by extensive reviews of empirical evidence, but in the present abridged version this review of evidence is limited to a few very brief summaries of extant research.

3.1 Assessment of arguments for and against drug criminalization in reviewed literature

My review of the arguments in Chapter 2 sometimes remarked that they appear to have an insufficient basis in research. However, recent years have expanded our knowledge basis and brought clarity to issues that were previously understudied. In some cases, this expanded knowledge base has served to support assumptions or arguments that were identified as potentially problematic in my preliminary assessment in Chapter 2. In these situations, the original authors were only able to theorize or provide limited evidence supporting their case, but subsequent research has bolstered their arguments. This means that the concern expressed in my preliminary assessment was, upon further investigation, unsubstantiated, and I see no reason to engage further with such concerns in the concluding discussion below. In other cases, arguments or assumptions that at some point might have seemed reasonable have been refuted by subsequent research and should now be abandoned.

3.1.1 Arguments related to harm

Proponents of drug criminalization usually argue that the use of prohibited drugs is a *grave danger* to the users themselves and/or their surroundings. Their opponents counter with the *exaggerated danger* and *criminalization exacerbates danger* objections. Comparative research of harms associated with substance use indicates that the use of alcohol and tobacco is more harmful than the use of illicit drugs such as cannabis and psychedelics, and about equally harmful to stimulant drugs such as amphetamine and cocaine (Bonomo et al., 2019; Nutt et al., 2010; van Amsterdam et al., 2015). The same holds for tendency towards dependence formation (Anthony et al., 1994; Lopez-

Quintero et al., 2011; Schlag, 2020), while in terms of acute lethal toxicity, alcohol has been found to belong among the most toxic drugs (Gable, 2004; Lachenmeier & Rehm, 2015). There is also clear evidence of an association between alcohol use and violence, but only limited evidence of a similar association involving illicit drugs (Coomber et al., 2019; Parker & Auerhahn, 1998; White et al., 2019), and alcohol intoxication has been found to incur substantially stronger risk for traffic accidents than cannabis intoxication (e.g., Brubacher et al., 2019; Drummer et al., 2020; Li et al., 2017; Martin et al., 2017; review in Johnstad, 2022a, 2022d). While the association between cannabis use and psychosis has been much emphasized, a review of the relevant studies found that the association between tobacco use and psychosis was as strong or even stronger (Johnstad, 2022a). Thus, the frequently discussed studies that identified cannabis use as a risk factor for psychosis also tended to identify tobacco use as an equally strong risk factor for psychosis, although they often neglected to say much about this latter finding. Furthermore, a broader review of putative drug harms found that while the illicit drugs cannabis, psychostimulants (amphetamine and cocaine), and opioids were all associated with a broad range of mental health disorders, the same was true not only for tobacco and alcohol but also for sedentary behaviors such as TV viewing and behaviors related to poor diet quality such as soda consumption (Johnstad, 2023e).

The finding that illicit drug use is only as harmful as many other unhealthy activities does not imply that these harms are insignificant, but it does seem to render the *grave danger* argument invalid as a basis for drug criminalization. Instead, there is good reason to believe that *criminalization exacerbates danger*, as the policy renders drug use substantially more harmful because it entails a lack of quality control, the spread of infectious diseases, and a number of other problems (Lintzeris, 2009; Mella-Raipán et al., 2020; Saleemi et al., 2017; Vevelstad et al., 2012). With regard to the *drug use harms others* argument, research indicates that the substance most closely associated with violent behavior and other such harms is alcohol. However, people with long-standing drug use disorders sometimes resort to violent crime in order to raise money to maintain their habits, and the cartelization of the illicit drug trade has resulted in extreme violence especially in the Global South (Calderón et al., 2021; Fondevila et al., 2020; Johnstad, 2023c). As such, the *unintended negative consequences* of drug criminalization include a range of very substantial harms that seem to outweigh any harms caused directly by drug use itself. Furthermore, research has shown that the negative consequences caused by the drug war has a much stronger impact on racial minorities, as per the *criminalization is racist* argument (Brunson, 2007; Csete et al., 2016; Koch et al., 2016; Omori, 2019; Roberts, 2022; Shiner et al., 2018; Solhjell et al., 2019; Sollund, 2006; White, 2015). Finally, while substance use leads to overfrequent abuse and use disorder in some users, there is also some support for the *positive drug use* argument that emphasizes that moderate use may hold utility and

benefit for the user (Griffiths et al., 2006, 2019; Johnstad, 2018a, 2020b, 2022b, 2022c; Pedersen et al., 2021; Timmermann et al., 2018; Yaden et al., 2017).

3.1.2 Arguments related to prevalence

Besides pointing to the harms caused by drug use, proponents of criminalization usually argue that legalization will entail substantial increases in use. In other words, they argue that *criminalization curbs use*. However, there is little evidence for a substantial increase in drug use after a liberalization of the legal regime (review in Johnstad, 2023c). In the United States, there were moderate increases in cannabis use among adults after legalization, but no increase among adolescents (Gabri et al., 2022; Hall & Lynskey, 2020; Hasin & Walsh, 2021; Hughes et al., 2018; O'Grady et al., 2022; Patrick et al., 2022; Smart & Pacula, 2019). Long-standing liberalizers such as Czechia, the Netherlands, and Portugal are not doing especially poorly in terms of drug use (European Monitoring Centre for Drugs and Drug Addiction [EMCDDA], 2022). Thus, the available evidence indicates that *criminalization is ineffective*.

The ineffectiveness of the drug war is even clearer if we distinguish between drug use and drug abuse. Defenders of the criminalization regime often claim or assume that the level of drug abuse is directly proportional to the level of drug use (the *use-abuse proportionality* argument) or even that drug use *is* drug abuse (the *use-abuse equivalence* argument), but these arguments are not supported by research. For the *equivalence* argument, evidence indicates that illicit drug use results in dependency in between 5% (for psychedelics) and 23% (for heroin) of cases (e.g., Anthony et al., 1994). The majority of the people who experiment with drug use therefore remain moderate users, and, as per the above discussion, such moderate use is not more harmful than moderate alcohol use. Failing to distinguish between moderate use and dependence or use disorder is therefore confused. For the *proportionality* argument, researchers have found that while there was evidence of a moderate increase in overall cannabis use after decriminalization, there was usually no corresponding increases in cannabis abuse or use disorder (Mauro et al., 2019; Williams et al., 2017; Zellers et al., 2023). Thus, as Nadelmann (1992) and Miron and Zwiebel (1995) predicted, it appears that most of the newly added users after decriminalization are moderate recreational users. One explanation for this effect is that people at risk for non-moderate drug use are probably less deterred by drug prohibition since they have less to lose by getting into legal trouble, and are therefore more likely to engage in illicit drug use and correspondingly less likely to be among the newly added users post-legalization (Johnstad, 2022a, 2023e). Furthermore, there are a number of mechanisms whereby drug criminalization may cause increased drug abuse especially over the long term

(Johnstad, 2023d). One important dynamic in this regard is that the cartelization of the illicit drug trade entails large increases in violent crime, which cause misery and trauma to the people caught up in it. One consequence is that these people are at risk for escapist drug abuse. In sum, the *use-abuse proportionality* and *equivalence* arguments remain unsupported, while there is evidence to support the argument that *criminalization increases use* (in the form of abuse).

Defenders of the drug war sometimes provided additional arguments to bolster the case that decriminalization would lead to a sharp rise in prevalence. Although the underlying *criminalization curbs use* argument is largely rebutted, a brief assessment of the supportive arguments is appropriate. One such argument was that decriminalization would *send the wrong message* especially to adolescents, and by implication increase the probability of adolescent drug use. Interestingly, however, the evidence reviewed above indicates that adolescents appear to be the demographic whose post-decriminalization cannabis use has most clearly remained stable. It therefore appears that the endeavor to send the right official message to young people was less important than some people believed. Furthermore, according to the *radical legalization* argument legalization must entail “allowing all individuals to have any drug of any potency, without any restriction whatsoever” (Lawn, 1990, p. 712). This lack of restrictions would apparently include age limits, thereby allowing drug sales to children and presumably increasing adolescent drug use. Subsequent decriminalization efforts in the United States and other places have not deemed it necessary to remove age limits, however. Finally, the argument of *cultural or societal unreadiness* suggested that the United States, and by implication the rest of the western world, lacked cultural or societal “patterns of self-control with respect to [drug] use” and would therefore easily be led astray by a decriminalization policy (Kaplan, 1988, p. 38). As the underlying prediction of sharply increasing drug use has not borne fruit in either Portugal, the United States, or any other decriminalizing polity, it appears that Kaplan underestimated the capacity of western cultures to develop patterns of self-control in a changing world.

3.1.3 Arguments related to legitimacy

It may be possible to defend the drug war on the basis that illicit drug use is, in and of itself, fundamentally illegitimate. According to the *universal condemnation* argument, which has been stated explicitly only by people who reject it, the wrongness of drug use is so obvious that it does not require any justification. Drug use has not been cross-culturally condemned throughout history, however (e.g., Johnstad, 2022b). Instead, the use of presently illicit drugs has often been accepted and integrated in a variety of cultural practices, not least those pertaining to religion (Guerra-Doce,

2015; Hultkrantz, 1997; Labate & Cavnar, 2014, 2016; Maroukis, 2012). The claim that drug use is obviously wrong therefore seems to founder on the fact that a wide range of human cultures have accepted and integrated such drug use.

However, a possible modification of the *universal condemnation* argument is that the wrongness of drug use is so obvious that it *should* not require any justification. Thus, the fact that many cultures have failed to recognize this wrongness implies only that they have failed to understand what should be obvious and that they are therefore, at least in this specific way, inferior. None of the drug war defenders reviewed in Chapter 2 held this view, although we should recognize that such views about cultural superiority and inferiority were very common in the western world at least until the mid-20th century. Since the *universal condemnation* argument obviously founders in the empirical sense, anyone expressing support for this argument would probably have to be understood as supporting it in this second, normative sense. However, the portrayal of cultural practices common to non-European cultures as not only fundamentally wrong, but so obviously wrong that their wrongness should be self-evident, seems vulnerable to accusations of racism.

One partial exception relates to religious traditions. It is not uncommon for people who belong to a specific religion to understand this religion as being superior, and other religions therefore as inferior. Furthermore, it is also not uncommon for such religious people to see their own religion as expressing or reflecting divine or transcendent truth in a way that is fundamentally different from other religions. On a religious basis, therefore, it is possible to hold that the truth of a given tenet would be obvious to anyone who has the proper access to divinely inspired truth. It is not, I believe, racist to hold that one's own religious tradition is qualitatively superior to any other tradition, because such a view could be based on a perceived transcendent foundation that differentiates it from assessments of other cultural traditions related only to human affairs. However, the dividing line is a fine one, and we would not be surprised to find that negative evaluations of other peoples and cultures are sometimes entwined with negative evaluations of their religious traditions.

The denunciation of drug use as morally wrong on a religious basis may be a form of *universal condemnation* because of the assessment's perceived origin in transcendent, and therefore universal, truth. It may therefore be legitimate to hold that the use of certain drugs is universally wrong because a given religious tradition perceived to constitute the one true religion declares such drug use to be wrong. Lovering (2015) attempted to rebut the philosophical validity and relevance of this position, but the people who support it are probably unconcerned with such objections. According to the principle of freedom of religion, as protected for instance by Article 18 of the Universal Declaration of Human Rights, people who believe on a basis of religious dogma that certain

forms of drug use is fundamentally wrong should clearly be allowed to hold that belief and act in accordance with it, although the same principle would also seem to allow other people the freedom not to believe or act in accordance with such religious dogma. The position that some forms of drug use are morally wrong because it breaks with *religious orthodoxy* would therefore seem relevant primarily for the people who choose to live according to such orthodoxy. Sullivan and Austriaco (2016) expressed support for such a position in the last part of their article, where they quoted Ratzinger's statement that "[d]rugs are the pseudo-mysticism of a world that does not believe yet cannot rid the soul's yearning for paradise" and argued that drug use in spiritual contexts means to lock "ourselves into a dungeon of our own making" (pp. 167–168). I am not in a position to ascertain the validity or value of drug-induced spiritual experiences, but such experiences have been reported by many users especially of psychedelic (or entheogenic) drugs, even among Christian divinity students (Griffiths et al., 2006; Johnstad, 2021b, 2022b, 2022c; Pahnke, 1966, 1969). However, Johnstad (2022b, 2023b) has argued that religions with long-established hierarchies and dogmas have reason to oppose individualized mysticism empowered by entheogenic drug use as a threat to their authority.

Arguments based on *religious orthodoxy* usually warn against the spiritual harms incurred by drug use, and indeed non-conformity to orthodoxy may itself be understood as causing such harms. However, we could also understand spiritual harms in terms of a degrading effect on rationality and morality related to brain damage. Such arguments were presented both by Sullivan and Austriaco (2016) and by Hsiao (2017, 2019), and I will discuss them in detail. Sullivan and Austriaco (2016) cited pharmacological research to demonstrate that cannabis is harmful to the body, to cognition, and to mental health, but failed to recognize that tobacco use is associated with similar levels of harm, while alcohol use is substantially more harmful (Bonomo et al., 2019; Di Forti et al., 2019; Johnstad, 2022a, 2022d; Nutt et al., 2010; Quattrone et al., 2021; van Amsterdam et al., 2015). The assessments of drug harms reviewed above universally agreed that alcohol is more harmful than cannabis, and while heavy cannabis use may be associated with airway injury and health risks for people with cardiovascular disease, heavy alcohol use is associated with brain damage and cognitive dysfunction, central nervous system infection, hypoglycemia, hepatic failure, and the Korsakoff syndrome. Similarly, while some researchers have identified an association between cannabis use and psychosis, the association with psychosis appears to be at least as strong for tobacco as for cannabis (Johnstad, 2022a, 2022d). Furthermore, in studies of cognitive impairment, controlling for cigarette smoking tended to attenuate the effect from cannabis, while the effect from tobacco use remained significantly negative even when controlled for cannabis use (McCaffrey et al., 2010; Mokrysz et al., 2016; Stiby et al., 2015). Moreover, comparisons of the cognitive impairment associated with acute

cannabis intoxication with that of acute alcohol intoxication indicate that alcohol is the most debilitating. One perspective on such impairment may be obtained from the literature on the associations between drug use and traffic accidents cited above, where researchers agree that the risk associated with alcohol intoxication is far higher than the risk associated with cannabis intoxication, indicating stronger impairment from alcohol use than from cannabis use.

The second problem in Sullivan and Austriaco's argumentation is that they assumed that the health risks incurred by heavy drug use is relevant for every kind of use. In their identification of health harms from cannabis use, they pointed to airway injury identified for instance in a study by Beshay et al. (2007), whose participants had smoked a median of 6 cannabis joints per day over a mean period of 8.8 years, and who were also chronic tobacco smokers. This is the equivalent of warning against alcohol use in general on the basis of having found that people who have drunk two bottles of whiskey every day for eight years are at increased risk for Korsakoff syndrome, dementia, and a long list of other medical conditions. While it is true that chronic alcohol abuse over many years is associated with substantial health risks, this does not mean that having a beer with your pizza every now and then is similarly harmful, even in a dose-adjusted manner. Moderate alcohol consumption probably does not cause any brain damage at all, because such damage is associated with the heavy chronic types of use that deprives the brain from any opportunity of restoration.

The underlying problem with both of these mistakes is that Sullivan and Austriaco argued their case on the basis of a *use-abuse equivalence* argument for cannabis, but not for alcohol. They supported this distinction with a fanciful linguistic analysis that compared the terms for the cannabis "high" to the "drunkenness" caused by alcohol, but their conclusion that alcohol can be used in moderation (without intoxication) while cannabis use always involves intoxication is wide off the mark. As their own discussion of Simons et al.'s (1998) model of motives for cannabis use should have indicated, people use for cannabis for enhancement, coping, conformity, expansion, and social purposes, indicating a wide variety of use motives that are not always compatible with non-moderate forms of intoxication. Furthermore, Simons et al. based their model on the Drinking Motives Measure developed by Cooper (1994), and their results indicated that motives for cannabis and alcohol use were similarly structured among respondents and tended to resemble each other. Especially when it comes to socializing and celebrating special occasions, cannabis use resembles alcohol use in the sense that some people take high doses and become intoxicated, while other people take moderate doses and converse politely while raising their eyebrows at the antics of those who are intoxicated. Moderate substance use is not a practice reserved for alcohol, and indeed even the easily abused opiates can be used in moderation, as the author Somerset Maugham discovered when he visited a classy Chinese opium house in 1922 and found it frequented by an elderly gentleman reading a

newspaper, two friends conversing over a pipe, and a family with children (cited in Hauge, 2009). The reason Sullivan and Austriaco were not aware of moderate cannabis use is probably, as Hari (2015) maintained, that under a criminalization regime, “[a]ll we see in the public sphere are the casualties. The unharmed 90 percent use in private, and we rarely hear about it or see it” (p. 147).

A further problem with Sullivan and Austriaco’s argumentation is that they assumed that the cognitive impairment possibly associated with cannabis use entails impairment of rationality understood broadly as not only “calculation” but “the use of wit, of imagination, of memory, of contemplation, of meditation, of prudential deliberation” (p. 164). While it may be possible to abuse cannabis to such an extent that one’s wit and imagination is at least temporarily impaired, I believe it is obvious that this is equally possible with alcohol. Moreover, when psychologists measure people’s cognitive capacity, they do not attempt to measure wit, imagination, contemplation, meditation, or prudential deliberation, but rather one’s capacity for rote memorization, performance on IQ tests, processing speed, and similar tasks that are easily quantifiable, and which are indeed more closely related to calculation than to wit, imagination, and so forth. It is possible that there is a correlation between working memory and rationality in the broader Aristotelian sense, but I am not aware of any research identifying such a correlation, and Sullivan and Austriaco did not cite any. Thus, a more sober assessment of the research literature they did cite is that heavy cannabis use, even after the period of acute intoxication, is associated with lower performance on tests of working memory capacity, mental processing speed, et cetera, with the qualification that tobacco use is equally or more strongly associated with low performance in these areas. As the authors of one of the reviews used by Sullivan and Austriaco to substantiate their claims stated, “among adults with a lifetime marijuana use disorder (DSM-IV criteria for abuse or dependence), 82% also met criteria for an alcohol use disorder, and 48% met criteria for nicotine dependence” (Schweinsburg et al., 2008, p. 99). Thus, it is far from obvious that the observed cognitive impairment is related to cannabis use at all, and even less obvious that it translates into impediments to wit and imagination. In sum, Sullivan and Austriaco’s claim that cannabis harms users by degrading their rationality is unsupported by their analysis and serves as an example of the tendency to exaggerate the dangers of illicit drug use.

In a similar argument to that of Sullivan and Austriaco, Hsiao (2017) argued that intoxication (from alcohol and illicit drugs alike) is immoral because it impedes rationality, which is essential for morality and autonomy. As argued above, however, the link from lower performance on IQ tests and working memory tasks to rationality in a broader sense is by no means evident. While it may be obvious that “even drugs that are sometimes thought to be relatively safe, such as alcohol, can impair mental functioning when consumed in sufficient quantities” (Hsiao, 2017, p. 610) – you can, after all, drink yourself into a stupor – it does not follow that moderate intoxication will necessarily

impair one's capacity for moral action. One of Simons et al.'s (1998) motives for cannabis use was expansion, measured by endorsement of items such as "to know myself better" and "to expand my awareness", which seems more relevant for moral capacity than temporary impairments to the efficacy of working memory. In my own research, psychedelics users commonly reported that their drug-induced experiences helped them towards a better understanding of themselves and their relations, thus making their lives better over the long term (e.g., Johnstad, 2018a, 2021b, 2022c). Reported improvements included the resolution of anger issues, freeing oneself from addictions and other negative behavior patterns, and taking up spiritual practices such as meditation, all of which seem relevant for morality. In sum, Hsiao's position is vulnerable to the *exaggerated danger* objection and also failed to take notice of the *positive drug use* argument.

Hsiao's (2017, 2019) extension of this argument to our capacity for autonomy is interesting since it engages with the issue of abdicating one's liberty or sovereignty. As discussed in Section 1.3, a possible Millian objection to drug use is that some drugs are so addictive or debilitating that their use may be understood as abdicating one's liberty and selling oneself into slavery. Similarly, Section 1.4 discussed a possible Kantian objection to the use of drugs that pacify users and deprive them of their independence. If we can understand addiction in and of itself as a threat to liberty and sovereignty, then this would be a problem especially for tobacco, which is widely recognized as the most dependence-forming substance, producing dependence in between a third (Anthony et al., 1994) and two-thirds (Lopez-Quintero et al., 2011) of people who take their first toke. Although people with nicotine dependence develop a craving for their drug that in some senses threaten their liberty – they frequently have to go outside for a cigarette, and may be so unfavorably inclined towards long flights that their freedom of movement is effectively constrained – I do not believe it is reasonable to claim that nicotine addiction is such a threat to people's liberty that we need to criminalize tobacco. After all, people can clearly exercise their sovereignty in numerous ways even if they have to take frequent cigarette breaks.

Thus, the impediment from addiction in and of itself does not seem sufficient to count as a viable threat to autonomy, and if this is true for the highly addictive tobacco, then it would presumably also be true for less addictive substances. More convincing threats to autonomy might be found in the debilitating effects of some drugs, or in a combination of debilitation and addictiveness. For debilitation, the most relevant drugs seem to be depressants such as alcohol, benzodiazepines, and opiates, high doses of which are clearly sufficient to incapacitate a person for a few hours. It is not difficult to argue that people slumbering in a drunken stupor have reduced autonomy and sovereignty, since they are in fact entirely deprived of the capacity to act. Taking such drugs in high doses therefore seems problematic from a sovereignty perspective. Other drugs, such as some

psychedelics, may also result in reduce capacity to act while the intoxication lasts, but users of such drugs have often claimed that the intoxicated state provides insight into themselves and their worlds and other benefits that last beyond the acute effects of the drug (e.g., Johnstad, 2021b). Such use may therefore be understood as an investment that reduces functioning in the immediate term but increases it over the long term. If the overall effect from psychedelics use is to facilitate personal growth and development – which is supported by some evidence but is by no means a proven fact – then it would be possible to argue that such use actually strengthens sovereignty. Of course, there may be analogous effects from depressant use, in the sense that people sometimes self-medicate with such drugs in order to be able to cope with everyday life, thereby functioning at a higher level of sovereignty than what would otherwise be possible. Nevertheless, assessments of addictiveness reviewed in Chapter 3 indicate that depressants seem quite susceptible to abuse, and long-term use of such drugs from a coping motivation probably incurs a high risk of dependence, which in turn probably has a long-term effect of reducing sovereignty. From a sovereignty perspective, the most severe problem with drug use relates to the kind of habitual use that results in frequently repeated debilitation, thus reducing autonomy also in the long perspective.

I would therefore agree with Hsiao that drug abuse (as opposed to drug use in general) may be problematic from a sovereignty perspective. Hsiao (2019) was mistaken in singling out cannabis for criminalization on these grounds, however, since cannabis ranks below alcohol, heroin, cocaine, amphetamines, and tobacco in terms of harmfulness and addictiveness. He defended criminalizing cannabis while keeping alcohol legal on the basis of the *use-abuse equivalence* argument, which is as unconvincing in Hsiao’s employment as it is elsewhere, and by pointing to the *grave danger* for cognition incurred by cannabis use. Since the long-term cognitive impairment from cannabis appears to be of equal or less magnitude than the corresponding impairment from tobacco, not to mention alcohol, this point is clearly vulnerable to the *exaggerated danger* objection.

Although Hsiao was wrong to single out cannabis, the argument from sovereignty may seem convincing especially for alcohol and heroin. There are two reasons why criminalizing alcohol and heroin over sovereignty concerns is problematic, however. First, as Smith (2002) observed, autonomy-based arguments may support the immorality of drug use, but they oppose its criminalization. Criminalizing drugs over sovereignty concerns means depriving people of their autonomy with regard to drug use in order to preserve autonomy generally, which is paradoxical and perhaps self-defeating since the preservation of general autonomy might seem to rely on the exercise of autonomy in specific situations. Kant himself commented upon this paradox in *An answer to the question: ‘What is enlightenment?’* from 1784. Defining enlightenment as “man’s emergence from his self-incurred immaturity” and immaturity as “the inability to use one’s own understanding

without the guidance of another” (p. 54), Kant ironized over how most people are content to remain immature, while the guardians who take it upon themselves to supervise others succeed only in perpetuating the public’s immaturity. By preventing people from taking a single unsupervised step and emphasizing “the danger which threatens them if they try to walk unaided”, the guardians undermine maturity by preventing its exercise. “Now this danger is not in fact so very great, for they would certainly learn to walk eventually after a few falls” (p. 54), Kant continued, succeeding (by accident) also in summing up an important point about drug use, which is not inherently more dangerous than alcohol use and which most people would be perfectly capable of managing on their own, if they were only allowed to exercise their sovereignty and develop cultural norms for appropriate use.

Hsiao, however, tried to have it the other way around, in a statement that is worth quoting in full:

[I]t would be bizarre to argue that the state’s goal of promoting liberty is served by allowing its citizens to undermine their own liberty. The initial decision to engage in marijuana use may be free, but the end result is the diminution of liberty. One cannot realize his liberty by suppressing it, any more than one can become healthy by becoming ill. The idea that drug use can be justified by an appeal to freedom or liberty is thus self-defeating in the same way that drinking seawater to remedy thirst is counterproductive (Hsiao, 2019, p. 20).

In his analysis, therefore, it would be bizarre to argue that one would provide liberty to people by allowing them the liberty to choose if and how they are to engage in the use of cannabis, because the end result of such use is the diminution of liberty. Hsiao’s assertion that “[o]ne cannot realize his liberty by suppressing it” is ironic in this context, since the entire point of his argument is to realize people’s liberty by suppressing their liberty to take drugs. We should remember also that Hsiao’s end result of diminished liberty is based on the rather dubious analysis that since cannabis is used with the intent to get intoxicated, its ‘paradigmatic use is abuse’, which makes the clinical findings of impaired cognition after many years of chronic abuse relevant for any kind of cannabis use. Thus, by conflating use and abuse, Hsiao was able to reach the conclusion that it would be bizarre – not only for public health, but for public liberty – to allow people the liberty to make their own choices with regard to drug use, because very intensive use over many years is associated with impaired cognition, which means that all cannabis use diminishes liberty because all use is abuse.

The second reason why criminalizing alcohol and heroin over sovereignty concerns is problematic is that criminalization exacerbates the negative effects that drug use may have on sovereignty. While the criminalization regime may serve to suppress drug use among well-functioning individuals who have much to lose by being caught on the wrong side of the law, these are not the kinds of people who are at risk for ending up with drug use disorders. There is a number of reasons why drug

criminalization may increase drug abuse via intermediary variables such as criminal entrepreneurship, social misery, and psychological trauma (Hesketh & Robinson, 2019; Johnstad, 2023e; Talmage et al., 2019). Furthermore, the criminalization regime leads to inflated drug prices, making it very costly for people with well-established addictions to maintain their addiction. This is an intended effect, of course, and is supposed to reduce drug use by making it very expensive. While this approach may work for some individuals, it serves to entrap many others in a state of drug dependence they can neither afford on an ordinary income nor let go of. Instead, such dependent users may go to extremes in order to raise the money needed to maintain their addiction, for instance by resorting to violent crime or prostitution. In this manner, criminalization often turns dependence into a full-time life project, with dependent users being forced to live in a constant search for money. This effect obviously serves to deprive such users of their autonomy by denying them the opportunity to pursue other life projects. Being stuck in such an autonomy-deprived situation also increases the misery of such people, and living a miserable life that one feels a constant need to escape from via chemical means is an important basis for continued drug abuse. For this reason, drug criminalization may perpetuate drug abuse by imprisoning dependent users in a life-destroying situation.

Furthermore, a third reason that sovereignty concerns do not provide a basis for drug criminalization is that the drug war often entails large increases in violent and property crime (Abadinsky, 2011; Coyne & Hall, 2017; Goldstein, 1985; Jacques & Allen, 2015). Such criminality serves to constrain citizens' sovereignty in a number of ways, among them by compelling people to stay at home as much as possible because their neighborhood is too dangerous. The irony that the war on drugs causes more harm than it protects against thus has a parallel effect on citizens' freedom. Even if the attempt to protect their freedom by constraining their freedom to take drugs should be successful, which in light of the above discussion seems doubtful, the criminality resulting from the criminalization regime serves to deprive the whole population of freedom.

With reference to Kant's point about immaturity, it is also possible to argue that the drug war deprives people from the possibility to develop personally and culturally mature approaches to drug use. What would truly protect people from getting entangled in patterns of drug abuse is not strict supervision from self-appointed guardians, but a process of maturation whereby individuals and the culture as a whole develop norms for how to engage with psychoactive drugs. This process may involve some stumbling and falling at first, but eventually most people would manage to walk unaided in this terrain, which is not more difficult to navigate than that of alcohol. Well-meaning guardians who intend to preserve people's autonomy by preventing its exercise succeed only in a

double diminishment that deprives people of autonomous choice while exacerbating autonomy-harming drug abuse.

Before moving on, we should recognize that it may be possible to hold that a *policy* of drug legalization is illegitimate. Corlett (2013) argued on a basis of the principle of *responsibility* that the use of drugs (including alcohol) is so harmful to others that it should be subject to a tax covering the costs of liability insurance. Without such insurance, which to his mind would amount to several million dollars, legal distribution of drugs would be irresponsible and thus illegitimate. The inclusion of alcohol in this argument is reasonable given that the research reviewed above identified alcohol as being the most harmful drug in terms of harm to others, but Corlett's position would still have to contend with the fact that many illicit drugs seem to cause very little harm to others. If he would demand liability insurance amounting to millions of dollars for the legal purchase of such drugs, then consistency would seem to require similar levels of insurance baked into the prices of cars, guns, knives, and many everyday tools that are sometimes used to harm others.

More profoundly, Corlett failed to recognize that it is the drug criminalization regime rather than drug use in itself that causes the greatest harm to innocent people (Abadinsky, 2011; Coyne & Hall, 2017; Goldstein, 1985; Jacques & Allen, 201). Although alcohol use is implicated in many violent acts, the use of drugs such as heroin tends to pacify users, who only cause violence to others when they are desperate for a new hit and try to raise money via violent crime (Coomber et al., 2019; Parker & Auerhahn, 1998; White et al., 2019). In addition, the cartelization of the illicit drug trade has resulted in endemic levels of violence especially in the Global South (Calderón et al., 2021; Fondevila et al., 2020; Johnstad, 2023c). Thus, it is the policy of drug criminalization rather than drug use in itself that results in disturbing levels of violence and great harm to innocent people. Corlett's line of argumentation therefore missed the point entirely, because drug criminalization greatly exacerbates the harm to others incurred by drug use. Although it does, of course, happen that people drive under the influence of drugs or alcohol and thereby cause harm to others, there is much more harm in the violence entailed by drug criminalization. Furthermore, criminalization does not substantially reduce drug use and very likely increases drug abuse, which is the form of use most likely to cause harm to others. If Corlett is concerned about harms to innocents, he should favor a policy that actually serves to reduce such harms, and criminalization does the opposite.

On the other side of the table, it is possible to hold that *drug criminalization is illegitimate*. The most straightforward approach to such a position is the *libertarian* argument that the government has no right to interfere with individual citizens' drug use, even if such use should be tantamount to suicide (Friedman, 1972). Of course, as demonstrated by the review above, the use of illicit drugs is not tantamount to suicide but is rather like having a few glasses of wine. More harmful substances may exist or be invented, but the drugs that people actually use are generally not more harmful than alcohol is. More moderate approaches to the question of drug use and rights emphasized that the strict prohibition of drugs unnecessarily degrades a wide array of *civil rights* in order to protect people from a recreational activity that is probably not more dangerous than motorcycle riding, extreme sports, or the use of licit drugs (Bone, 2020; Husak, 1992; Nadelmann, 1992; Smith, 2002).

Another approach to the *criminalization is illegitimate* argument is to argue that the criminalization regime was implemented on false premises. While nominally introduced in order to protect people from harm, this approach holds that the drug war was actually intended to serve as a weapon in ongoing racial and cultural struggles and continues to serve this purpose. This first brings us back to the *religious orthodoxy* argument, with the claim that the moral condemnation of illicit drug use has a basis in a desire to protect the orthodoxy of the Christian tradition from heterodox spiritual experiences induced via drugs such as cannabis and psychedelics (Richards, 1981). I have discussed this argument at length in Johnstad (2022b, 2023b), finding that the demonization of illicit drug use has often been based on religious concerns. Indeed, the first drug criminalization campaign in the western world for which there is abundant historical evidence is the Spanish suppression of religious psychedelics use in their newly conquered American colonies (Campos, 2012; Chuchiak, 2012; Dierksmeier, 2020). These discussions also argued that personal spiritual experience can be understood as a source of spiritual authority that may challenge the institutionally based authority of a religious hierarchy, and especially when it breaks with the dogma that this religious hierarchy presides over (Asad, 1983, 1993; Fuller, 2000). On this basis, it seems clear that religious hierarchies are incentivized to prohibit the forms of drug use that sometimes induces spiritual experiences, and historically it is undebatable that the demonization of drug use in western cultures has sometimes been related to an underlying project of preserving Christian traditions from heterodox influences.

A similar argument relates the underlying motive for introducing drug criminalization to racial oppression (Earp et al., 2021; Gerber, 2004; Richards, 1981). The *criminalization is racist* argument points to the overt racism characterizing the early drug prohibition campaign and sees a desire to continue the subjugation of non-white people as a hidden motivation behind the implementation of the criminalization regime. That such racist motivation was an aspect of the early prohibition campaign in the United States is undeniable given the systemic racism characterizing the country at

least during the first half of the 20th century and the fact that drug use was associated with minority populations such as Blacks, Mexicans, and Chinese. It is also surely not a coincidence that the only (major) drugs to escape censure in the United Nations' drug control regime were the drugs that were accepted in European cultures by the 17th or 18th centuries, namely alcohol, tobacco, coffee, and tea. Evaluating the extent of the influence from racial prejudice is difficult, however. Perhaps the best approach in this regard is to note that both racial and religious prejudice probably served to inform perceptions about the harmfulness of non-European drug use. The Mexican Archbishop Lorenzana connected psychedelics-induced spiritual experiences with insanity as early as 1769 (Dierksmeier, 2020), and such disparagement of non-Christian religious practices may have served as a foundation for subsequent notions that psychedelics use causes psychosis, which remain persistent today despite a general lack of evidence (Johnstad, 2022d; Lebedev et al., 2021). Similarly, racially based prejudice might seem to explain why Europeans tended to exaggerate the health harms of cannabis use in Colonial Africa and why the association between cannabis use and psychosis still receives much attention although the evidence indicates that the association between tobacco use and psychosis is at least as strong (Duvall, 2019; Johnstad, 2022a). Today, there is broad agreement that racial disproportionality in drug crime policing remains an important issue especially in the United States (Brunson, 2007; Csete et al., 2016; Koch et al., 2016; Omori, 2019; Roberts, 2022; White, 2015), but also in England and Wales (Shiner et al., 2018) and the Nordic countries (Solhjell et al., 2019; Sollund, 2006), among other places. The racism inherent to the early drug prohibition campaign thus seems to have survived into the present day.

Finally, the *funding and turf* argument maintained that the drug criminalization regime is maintained for illegitimate purposes relating to the interests especially of law enforcement institutions (Coyne & Hall, 2017; Gerber, 2004). There is no question that law enforcement, which as an institution has strongly opposed the decriminalization of drugs, is also strongly incentivized by economic and other factors to support the continuation of the drug war. However, we should also acknowledge the impact from visibility on law enforcement attitudes: as Hari (2015) maintained, the 10% of drug users who develop an addiction are also the far most visible user segment, especially for law enforcement officers who spend much of their time dealing with criminals. From this perspective, we can understand that police officers, after spending much of their working lives dealing with drug-using criminals, tend to take a dim view of drug use. As with the above arguments related to religion and racism, however, it is easy to see the overlap between self-regarding interests and attitudes to the criminalization regime, but more difficult to assess the extent of its impact on law enforcement support for continuing the drug war. The broader version of the *funding and turf* argument held that policy makers use drug problems as a scapegoat and see them as the cause of a range of

socioeconomic problems for which, in reality, they are but a symptom (Christie & Bruun, 1985/2003). Instead of trying to solve the underlying problems, policy makers have invested in the seemingly less expensive policy of drug prohibition in the belief that the resolution of the drug issue would ameliorate other social issues as well. However, the drug war has not contributed to the solution of underlying social issues but has instead exacerbated such issues immensely, at least in the Global South (Calderón et al., 2021; Johnstad, 2023c; Mohor, 2022; Oliveira et al., 2020). By diverting societal resources away from the real problems over to a fruitless war effort, drug criminalization is an Orwellian perpetual war for perpetual peace that actually leaves us perpetually stranded in the status quo. And the status quo is a warzone that appears to kill tens of thousands of people every year in Latin America and harms countless others in ways that, among other things, place them at risk for escapist drug abuse.

3.1.4 Other arguments

Two remaining arguments from the overview in Section 2.15 relate mainly to practical issues. The first argument, endorsed by Lawn (1990), held that decriminalizing drug use would *violate international obligations*. This issue also involves legitimacy issues in the sense that it might be understood as a question of reneging on treaty commitments, although the 1969 Vienna Convention on the Law of Treaties allows signatories to renounce a treaty when they can argue a ‘fundamental change in circumstances’ (Clementi, 2021). Given what we know today about the consequences of the drug criminalization regime, it should not be difficult to argue that a change in circumstances has occurred, and Bolivia used this provision in 2011 to renounce the Single convention and subsequently re-accede with a reservation for coca use. Other options for liberalizing countries include treaty modifications and the establishment of an *inter se* agreement among like-minded states (Bewley-Taylor et al., 2014; Clementi, 2021; Habibi & Hoffman, 2017; van Kempen & Fedorova, 2018). Bone (2020) recommended the adoption of such *inter se* modification as an approach that allows for decriminalization while maintaining “a healthy respect for the principles of international law” (p. 98).

Finally, according to the *practicality* argument supported by Sher (2003), even if illicit drug use is not more harmful than alcohol use, reversing their respective legal status is impractical. A more general version of this argument holds that the fact that we already have some harmful substances in our society does not mean that we should allow for more harmful substances. In the western world, we already have the dangerous substances alcohol and tobacco, and we do not need any other such substances. Furthermore, while the optimal societal solution might (according to this argument) involve the criminalization of both (presently) licit and illicit drugs, alcohol prohibition is not

politically feasible because of the popularity of alcohol use. As Bismarck once claimed, politics is the art of the possible, and when the optimal solution is not politically feasible, it necessary to choose the best suboptimal solution that is feasible. Therefore, although alcohol is more harmful than cannabis, we end up with legal alcohol and illegal cannabis.

While such an argument may seem rational from a certain point of view, criminalization policies based on practicality will tend to align with existing societal power dynamics and thereby favorize dominant groups. From a practicality perspective, it is feasible to criminalize cultural practices favored by small minority groups, because these groups tend not to possess powerful societal allies who will lobby policy makers on their behalf. Unless their cause is supported by civil rights organizations or similar groups, the political feasibility of criminalizing their practices is therefore guaranteed. On the other hand, the criminalization of practices common to societal majority groups is always difficult, because these groups will mobilize powerful allies to defend their cause. In these contexts, therefore, the *practicality* argument serves to reinforce existing power structures.

In western societies, extant power structures favor the white majority population. The pragmatic approach of criminalizing drugs on a basis of political feasibility will therefore serve to perpetuate the ethnoracial power dynamics of our societies. The main reason why it would be politically infeasible to criminalize alcohol in western societies is because white people, who retain more societal power than any other ethnoracial group, like to drink alcohol. Conversely, the criminalization of cannabis has been politically feasible because the use of this drug has been favored by groups such as Blacks, Indians, and Arabs, who have not (traditionally) wielded much political influence in western societies. Indeed, we can probably see the present-day decriminalization of cannabis in North America as a reflection of the reality that cannabis use has gained popularity among the white people of these societies. Cannabis has thereby gained a powerful societal ally, and this fact has changed calculations about political feasibility: because cannabis is becoming a drug commonly used by white people, its criminalization is no longer as feasible as it once was.

Besides this issue of societal power dynamics, the *practicality* argument also presupposes that drug criminalization is at least minimally effective. If this policy regime mainly serves to discourage potential recreational users, as Nadelmann (1992) and Miron and Zwiebel (1995) predicted it would and which plenty of recent evidence indicates it has at least with regard to cannabis (Mauro et al., 2019; Williams et al., 2017; Zellers et al., 2023), while at the same time producing drug abuse via the intervening variables of violent crime and psychological trauma (Abadinsky, 2011; Calderón et al., 2021; Coyne & Hall, 2017; Fondevila et al., 2020; Goldstein, 1985; Jacques & Allen, 2015; Johnstad, 2023c, 2023e) and also exacerbating the harms resulting from such drug abuse (Lintzeris, 2009;

Mella-Raipán et al., 2020; Saleemi et al., 2017; Vevelstad et al., 2012), that assumption of minimal effectiveness would seem not to hold.

3.2 Assessment of drug criminalization in criminalization theoretic perspectives

3.2.1 Legal moralism

Legal moralism presupposes a set of widely shared moral values – usually based on a specific religious tradition – and sees government as the guarantor of their continuation. From the perspective of legal moralism, drug use can or should be criminalized if it transgresses against these moral values, which many people have argued that it does. Lovering (2015) quoted a selection of prominent personages making this point, with William Bennett, the former director of federal US drug policy, stating that “[t]he simple fact is that drug use is wrong”, and George H. W. Bush, the former US president, claiming that “legalizing drugs would completely undermine the message that drug use is wrong” (p. 9). Lovering, with references to Husak, went on to note that these declarations of immorality are not usually accompanied by any sort of justification. Instead, the immorality verdict is presented as a brute fact, or in other words as so obvious as to require no explanation. However, the discussion in Section 3.1.3 rejected the attempt to label drug use as a universally condemned core crime, similar perhaps to patricide, and portray it as so obviously immoral that no justification is needed. Nevertheless, this discussion also acknowledged that the *universal condemnation* argument may take a religious basis where the universality is not based on human cross-cultural agreement but on transcendent forces. People who believe that the religious tradition they belong to is the only true religion may regard the dogma of this tradition as being universally true and applicable to all humans even as this universality is not cross-culturally recognized. The only obvious response to this argument is that the principle of freedom of religion allows people the right not live according to such religious dogma.

This response is actually a general repudiation of the criminalization theoretic legitimacy of religion-based legal moralism. While the moral values supplied by a given religion may be regarded as unquestionably true and universally applicable for people who belong to this religion, the right to freedom of religion affords people the option of choosing moral values supplied by other religious or secular traditions. Thus, it would appear that those who would criminalize behaviors on the basis that they transgress against the dogma of their religion would also have to deny the right to freedom of religion. Historically, such a denial of freedom of religion has obviously been very common, but it would not seem possible within the framework of a modern democratic society.

As far as legal moralism is based in religious dogma, therefore, it would not seem to constitute a legitimate approach to criminalization in a democratic polity. Nevertheless, it may still be possible to maintain that drug use is immoral on a non-religious basis, the only obvious candidates for which is its putative harmfulness and the threat it may serve to sovereignty. In order to condemn a behavior as immoral on these bases, however, it would seem that the threats it causes should be substantially higher than, and in some way qualitative different from, those caused by behaviors that are not similarly condemned. Threats to sovereignty are discussed (and found unconvincing) in Section 3.2.4 below, whereas for harm, the discussion in Section 3.1.1 identified several illicit drugs that seem to be less or about equally harmful both to users and to the people around them than alcohol and tobacco are. Thus, it would seem difficult to apply such moral condemnation only to illicit drugs. A blanket condemnation of all intoxicant use on the basis of its harmfulness would for its part have to contend with the fact that certain forms of intoxicant use appear not to be more harmful than a range of ordinary recreational activities (Johnstad, 2023e; Nutt, 2009). Furthermore, the use of such low-harm drugs also seems to provide high utility to some users (Griffiths et al., 2006, 2019; Johnstad, 2018a, 2020b, 2022b, 2022c; Pedersen et al., 2021; Timmermann et al., 2018; Yaden et al., 2017). In conclusion, there are no convincing arguments that support the verdict that drug use is immoral and can be legitimately criminalized because of such immorality.

3.2.2 Legal paternalism

Legal paternalism is the perspective that the state can legitimately criminalize a given behavior in order to protect citizens from harming themselves by engaging in this behavior. In order to criminalize drug use on this basis, it must be shown that the harmfulness of drug use for the user justifies criminalization. Of course, we have already assessed claims about bodily and mental harm resulting from drug use, and at this point need only repeat that the harms from drug use are not generally worse than the harms from alcohol or tobacco use, and often seem comparable to the harms from ordinary recreational activities. Claims about spiritual harms cannot be objectively assessed, but we have at least noted that religious traditions do not agree about the matter.

As the review in Section 3.1.1 indicated, illicit drugs do not actually have much in common with regard to the extent of the harm they incur on users, and any drug policy regime based on a concern for harm would necessarily have to take these factors into consideration rather than impose blanket criminalization on a range of drugs that share only a history of being proscribed. Even if drug use in general is apparently not sufficiently harmful to merit legitimate criminalization according to the perspective of legal paternalism, however, it may still be possible to criminalize specific drugs that

are found to be particularly harmful. Heroin, alcohol, and some of the stimulants seem like good candidates for this approach, as they have low safety ratios for acute lethal toxicity, high addictiveness, a generally score high on harm assessments (Anthony et al., 1994; Bonomo et al., 2019; Gable, 2004; Lachenmeier & Rehm, 2015; Lopez-Quintero et al., 2011; Nutt et al., 2010; Schlag, 2020; van Amsterdam et al., 2015).

Another possibility is to acknowledge the relatively low degree of harmfulness inherent especially to the psychedelic group of drugs as compared to the legal drugs alcohol and tobacco, but to justify a selective approach favoring the presently legal drugs on a basis either of expedience or utility. Sher (2003) suggested a solution of this type, arguing that maintaining the present criminalization regime would be “easier and less costly” than turning it on its head by criminalizing alcohol and legalizing presently illicit drugs (p. 33). Such feasibility concerns were clearly also part of the original selection of which substances to include in UN drug conventions: although cannabis is less harmful than alcohol on a range of indicators including acute lethal toxicity, addictiveness, violence, traffic accidents, and expert ratings of overall harmfulness, only cannabis was proscribed under these conventions. Alcohol, as the traditional intoxicant of choice among white people, had powerful defenders in Europe and elsewhere who were not likely to support a global ban, whereas cannabis, as an intoxicant preferred by many non-white people, did not have many such powerful defenders. As previously argued, however, the *practicality* argument clearly favors the powerful and will tend to perpetuate traditions of racial and cultural discrimination.

Discrepancies in criminalization based on perceived differences in utility are somewhat more promising, but do not seem to favor alcohol or tobacco. While alcohol has many uses as a social lubricant and for purposes of self-medication, other drugs have similar effects. As the earlier described anecdote from Maugham’s (1922) visit to a classy opium house suggests, one could probably achieve many of the same effects with an appropriately dosed pipe of opium. Stimulants for their part have the obvious utility of keeping people awake and alert, and there are plenty of studies indicating the utility of cannabis, MDMA, and psychedelics for spiritual pursuits, self-development, and psychological insight (e.g., Griffiths et al., 2006, 2019). Thus, while utility may possibly compensate for harms, the drugs with the highest utility also appear to be those that are associated with the lowest harms, rendering the argument from utility superfluous in this context.

In order to justify drug criminalization on a paternalistic basis, one should also demonstrate that the criminalization regime is likely to reduce the immoral behavior. Arguments to this effect usually take recourse to general principles of supply and demand (Hsiao, 2019; de Marneffe, 2003), ignoring how criminal entrepreneurship, the forbidden fruit effect, and psychological trauma and social misery

resulting from the drug war contribute to drug use. As reviewed in Section 3.1.2, decriminalization has not resulted in major drug problems in the Netherlands, Czechia, Switzerland, Portugal, Uruguay, or the United States, although it is true that research in the United States found moderate increases in cannabis prevalence among adults (but not among adolescents, and generally not in cannabis use disorder).

Finally, the attempt to criminalize drug use out of concerns about harm to people who use drugs faces the hurdle that such criminalization clearly exacerbates these harms. Drug use would be less harmful if it did not involve the possibility of harmful adulterants and contact with the criminal organizations that control the illicit market. Even while the more harmful drugs such as heroin, alcohol, and some psychostimulants might therefore be legitimately singled out for prohibition on a paternalistic basis, such a criminalization regime would most likely reduce only the extent of moderate recreational use of these drugs, leaving the extent of harmful abuse intact while also exacerbating the harms associated with such abuse. In conclusion, while a paternalistic policy of drug criminalization may be well intended, it is very hard to argue that such a policy would actually protect citizens from harm.

3.2.3 Harm to others

The harm-to-others perspective demands that we only criminalize activities that cause harm to others. From this approach, drug criminalization might be justified by identifying such harms, although, unless mitigating circumstances can be identified, it should also be shown that these harms exceed the harms from non-criminalized activities. The perhaps most obvious cause for concern might be that addicted users engage in criminal activities in order to raise money for drugs. There could also be concern about intoxicated drug users acting aggressively or negligently with regard to their dependents and concern about economic costs to the community.

As discussed in Section 3.1, the problem that drug addiction entails criminality is actually a consequence more of drug criminalization than drug use in itself. While it is true that illicit drug users sometimes develop dependence and turn to criminal activities to pay for their habitual drug use, the harms thus caused to others are strongly exacerbated by the criminalization regime, which entails inflated drug prices that force people with drug addictions to raise large amounts of money on a daily basis. As a side effect, inflated drug prices also mean that the drug trade is very profitable, which means that criminal gangs will fight for control over market access. This side effect causes immense harm. In comparison, addiction to legal drugs such as alcohol and tobacco does not have a strong criminogenic effect, and there is no obvious reason why the same would not hold also for presently

illicit drugs if they were decriminalized, for most of these drugs are not more addictive than alcohol or tobacco. For drugs such as heroin that are nevertheless highly addictive, the criminogenic effects of addiction could be entirely nullified by implementing a prescription program similar to those found in Switzerland and the Netherlands. Attempts to legitimize drug criminalization on a basis of the criminogenic effects of drug use are, therefore, absurd. With regards to crime, the harm-to-others perspective actually demands the cessation of drug criminalization because of the great harm this policy afflicts on the innocent (Abadinsky, 2011; Calderón et al., 2021; Coyne & Hall, 2017; Fondevila et al., 2020; Goldstein, 1985; Jacques & Allen, 2015; Johnstad, 2023c, 2023e).

Furthermore, it is clear that intoxicated people sometimes act violently, but this effect is associated most strongly with alcohol (Coomber et al., 2019; Parker & Auerhahn, 1998; White et al., 2019). Many illicit drugs such cannabis, MDMA, and heroin instead tend to make users peaceful, and cannot reasonably be criminalized on this basis even in a society that criminalizes alcohol (Boles & Miotto, 2003; Hoaken & Stewart, 2003). Drug abuse is also a cause of the neglect and abuse of children, but when it comes to active forms of abuse, the close association between alcohol use and violent behavior indicates that alcohol is more of a problem than illicit drugs. Child neglect in a context of drug use is probably connected mostly to addiction, and may be a problem especially with regard to the use of drugs such as heroin, alcohol, and some of the stimulants, which are both highly addictive and have an intoxicating effect not conducive to childcare. It is not obvious that a policy that forces such dependent users into a constant search for money helps them take better care of their children, however. Furthermore, the drug war does not seem to reduce drug abuse to any meaningful extent and may, especially over the long term, produce drug abuse by causing violent crime and resulting trauma and misery.

When it comes to economic costs, there is little doubt that drug use (especially abuse) incurs major costs to the welfare system, and therefore arguably causes harm to others in the form of disutility. Comparative harms assessments indicate that alcohol and tobacco are not less problematic in this regard than many illicit drugs, but Sher (2003) maintained that while the costs from alcohol use alone might be bearable, added costs from illicit drug use would compound the problem and make costs overwhelming. However, this argument is based on a number of poorly founded assumptions. There is no evidence that drug criminalization reduces drug abuse and several reasons to believe that it may instead increase such abuse. Furthermore, even if decriminalization leads to an increase in the prevalence of the decriminalized drugs, this does not entail an overall increase in drug use. If a modest number of adults take decriminalization as an opportunity to experiment with cannabis, as evidence has indicated for the United States, this does not mean that they will continue to use alcohol to the same extent as they used to (Alley et al., 2020; Anderson et al., 2013; Dragone et al.,

2019; Miller & Seo, 2021; Zellers et al., 2023). Instead, the evidence indicates that many people replace some of their alcohol use with cannabis use, which will have an overall positive effect for the welfare system since alcohol is more harmful than cannabis. Most problematically of all, Sher's argument about the harms from drug abuse neglects the obvious fact that drug criminalization is strongly criminogenic. While there are costs, monetary or otherwise, related to drug abuse, there are also costs related to violent gangs wreaking havoc on their communities. Keeping the police, courts, and prisons occupied with a large number of drug users is also not cost-free. Indeed, these costs clearly outweigh the costs related to minor increases in drug prevalence after decriminalization, especially since these increases in prevalence do not seem to be associated with corresponding increases in drug abuse.

In sum, illicit drug use does not, in and of itself, cause substantial harm to others. The criminogenic effects of drug addiction are primarily a consequence of the criminalization regime inflating drug prices, and this regime also has major criminogenic side effects that by far outweigh the criminogenic effects related to decriminalized drug use. Violence and active child abuse are problems related especially to alcohol use, and therefore do not justify the present criminalization regime. Drug addiction may lead to child neglect, but criminalization does not serve to reduce addiction and may indeed exacerbate the problem because it produces trauma and misery and incentivizes criminal entrepreneurship (Hesketh & Robinson, 2019; Johnstad, 2023e; Talmage et al., 2019). Attempts to justify drug criminalization out of a concern for harm to others, voiced for instance by Corlett (2013), are therefore unpersuasive since criminalization causes far more harm to others than drug use does by itself.

While blanket drug criminalization serves to exacerbate harms to others, it is possible that more nuanced and specific forms of regulation would mitigate harms. Our societies have many systems in place to mitigate the harms from reckless driving, and similar systems are conceivable for drug use. If heroin addiction causes child neglect, for instance, it should probably be mandatory for any parent enrolled in a heroin prescription program to agree to close supervision by childcare professionals. Similarly, such enrollees might have their driving licenses suspended. As Mill once suggested, special restrictions on drug use might be placed on people who act violently when intoxicated. Furthermore, since this problem is especially associated with alcohol use, violent alcohol users should perhaps be encouraged to switch to less harmful drugs such as cannabis. It might also be noted that the integration of presently illicit drugs into our societies would allow for the gradual establishment of social norms regulating the appropriate use of drugs, which over the long term would mitigate harms both to users and to others.

3.2.4 Sovereignty

The sovereignty principle demands the criminalization of behavior that infringes upon reciprocal freedom. One way to infringe upon another's freedom is to cause them harm, but this issue was discussed above and need not be repeated here. It is important to note, however, that because of its demand for reciprocity, the sovereignty principle introduces an important constraint upon attempts to justify criminalization on a basis of harm to others. The emphasis on reciprocal freedom entails that one cannot remove a restriction on one person's freedom by imposing a greater restriction on the freedom of another. This point might be explained by using my previous example of homosexuals kissing in the street. Some people might claim that such kissing forces them to remain indoors in order to avoid exposure to indecent behavior, but clearly it would also restrict homosexuals' freedom to impose restrictions on their amorous behavior that do not apply to other people. An analysis of this issue therefore needs to balance the various infringements on freedom up against each other. (It is also not clear to what extent exposure to perceived indecency might qualify as a legitimate infringement on freedom.)

In the drug criminalization debate, the sovereignty principle has been invoked on both sides of the divide. The case against criminalization is based on the straightforward point that people should generally be allowed to decide for themselves how to live their lives, unless there are specific and weighty reasons to impose restrictions on them. Drug use in and of itself does not interfere with other people's freedom and would therefore seem to belong to the range of activities that an individual may choose to engage or not engage with as they see fit. Since about 90% of drug users arguably manage to maintain a reasonable pattern of use (Anthony et al., 1994; Lopez-Quintero et al., 2011; Schlag, 2020), there is no obvious basis for depriving them of their sovereignty and treat them like children. In addition, we have seen above that drug use often has utility for users, especially in the case of spiritually and self-developmentally motivated psychedelics use. On the other side of the divide, it has been argued that drug use has such serious immediate and long-term negative consequences on users' cognitive capacity that it threatens their sovereignty (Hsiao, 2017; Sullivan & Austriaco, 2016). Thus, according to these authors, the special case of drug use necessitates the somewhat paradoxical approach of preserving citizens' sovereignty by restricting it.

As I have argued previously, the cognitive impairments that drug use supposedly entails have been grossly exaggerated, and find their basis in the confused supposition that impairments identified after long-term drug abuse are directly relevant for moderate users. While it is obvious that chronic alcohol abuse incurs a range of health harms that are not directly relevant for people who restrict their use to a drink or two with dinner, the exaggerated harms claims for illicit drugs are based on

denying the possibility of moderate use of such drugs. This approach allows for the conflation of harms from drug abuse and harms from moderate drug use, which is essentially a category mistake.

Nevertheless, it is clear that some drug users develop addictions that arguably threaten their autonomy. Although addiction in and of itself is probably not a very serious restriction on autonomy – tobacco is the most addictive drug of all, but few people would agree that we should criminalize tobacco because people with nicotine addictions are deprived of their autonomy – being addicted to a highly debilitating drug may qualify as a serious threat to one’s autonomy. If heroin addiction involves the use of heavy (and therefore debilitating) doses of the drug several times every day, and each period of intoxication lasts for up to five hours, then people with a heroin dependence may spend most of their time being in state of indisposition. It would not be difficult to argue that a life of near-continuous incapacitation is incompatible with personal autonomy and sovereignty. Of course, this characterization of the life of a person addicted to heroin is very unlikely to apply to everybody who, in one way or another, has a heroin dependence, and it is not clear how much debilitation is necessary to threaten autonomy. Some alcoholics probably also spend days and perhaps weeks in a drunken stupor, and some other people do perhaps use no drugs but spend most of their waking hours vegetating in front of the television, which is also a habit-forming activity.

As a conclusion to this point about autonomy or sovereignty concerns, it seems clear that moderate drug use does not threaten people’s sovereignty to a degree sufficient to warrant criminalization. Many drugs, especially the psychedelics, have low addictiveness and should therefore be of little concern in this context, but the abuse of more addictive and debilitating drugs such as heroin and alcohol may seem more problematic. However, it is not obvious that problems arising from drug abuse in a minority of drug users can justify the blanket criminalization of the abused substances. The fact that a minority of drug users are unable (or unwilling) to maintain a moderate use pattern does not mean that it is appropriate to constrain everybody’s sovereignty in order to engage in a sort of enforced preservation of sovereignty for this minority. Instead, the sovereignty principle emphasizes that we allow people the freedom to live their lives as they wish, as long as they do not interfere with the freedom of others. As noted previously, it is especially people with deep-seated psychological trauma and miserable lives who tend to end up in patterns of drug abuse, and for many of these people, the alternative to drug abuse might be suicide or some other self-destructive activity. Furthermore, there is also no evidence that the drug war reduces the extent of drug abuse and several reasons to believe it causes the trauma and misery that drive people into drug abuse. If we want to protect people from self-destructiveness, the most important thing is to avoid traumatizing and imposing miserable living conditions on these people. Since the war on drugs contributes to both trauma and misery, it would be helpful to end it.

3.2.5 Virtue

The aretaic approach to criminalization bases its verdict on an overall analysis of the costs and benefits of criminalizing or not criminalizing a certain behavior in terms of the societal conditions for human flourishing. In the context of drug criminalization, we must analyze how the criminalization regime may both support and undermine human flourishing, counting the benefits of criminalization and costs of non-criminalization on one hand, and the costs of criminalization and benefits of non-criminalization on the other.

Although the aretaic approach emphasizes human flourishing as a basis of consideration, this does not change any individual analysis in the above discussions. The bodily harms incurred by drug use diminish human flourishing, and putative beneficial effects from drug use related for instance to therapy, spirituality, and relatedness increase human flourishing. Racism diminishes human flourishing, and any policy regime that is an inheritance from a racist tradition and which is enforced with a racist bias is therefore problematic. Freedom of religion increases human flourishing, while any policy that involves the imposition of a religious orthodoxy is problematic. Crime and drug abuse diminish human flourishing, and policies that increase either are problematic. What remains for the aretaic approach is only to weigh these individual analyses in an overall holistic assessment.

Arguably, what distinguishes the aretaic perspective from other criminalization theories in a context of drug criminalization is therefore primarily that its overall assessment of how the drug war affects human flourishing is based on a weighing on all relevant benefits and detriments. The remainder of this section will thus serve essentially as a summary of previous analyses. It will discuss the positive or negative impact on drug abuse as a potential benefit and cost of both criminalization and non-criminalization, while the benefits of non-criminalization include harm reduction and the utility of positive drug use, and the costs of criminalization include criminality and violence.

The potential benefit from drug criminalization is that it may serve to reduce drug abuse, which clearly undermines human flourishing. Supporters of the drug war do not usually argue that moderate drug use also undermines human flourishing, although they may explicitly or implicitly maintain that there is no such thing as moderate use. Some illicit drugs, notably the psychedelics, are not addictive or especially harmful substances, and have been used for millennia in a variety of human cultures especially in religious contexts. Maintaining against evidence that all such use is

abuse – that is, negative and harmful use that leaves the user worse off – is to demean the cultures that have traditions of using these drugs.

The only benefit from drug criminalization that may legitimize the policy in societies that are not theocracies is that it reduces drug abuse, understood in the strict sense as harmful drug use. However, research does not support this conclusion to any substantial degree. Decriminalization of heroin by offering free heroin to people with an addiction problem in Switzerland did not result in increased abuse, but in a dramatic decrease in the recruitment of new users (Killias & Aebi, 2000; Nordt & Stohler, 2006; Uchtenhagen, 2010). Research on decriminalization experiences in European countries does not support the notion that the drug war reduces drug abuse, and most of the research related to cannabis decriminalization in the United States concurs (Gabri et al., 2022; Hall & Lynskey, 2020; Hasin & Walsh, 2021; Hughes et al., 2018; O’Grady et al., 2022; Patrick et al., 2022; Smart & Pacula, 2019). There is some evidence of increased cannabis prevalence among adults in the United States that implies that some people without previous cannabis experience have taken decriminalization as an opportunity to experiment with the drug, but these people who did not use cannabis when it was illegal are probably at low risk for ending up in patterns of cannabis abuse, however. Drug abuse is strongly associated with psychological trauma and social misery because the people who abuse drugs do so predominantly in order to escape from the realities of their everyday lives (Altekruse et al., 2020; Buu et al., 2009; Gotsens et al., 2011; Kuo et al., 2019; Reingle Gonzalez et al., 2016; Stone et al., 2012). In order to motivate people for escapism, those realities must be, in one way or another, negative. The people who live such problematic lives have less reason to be concerned about what will happen if they get in trouble with the law, because their lives are already not going well and they may feel they have little to lose. By contrast, people who live good lives with flourishing careers and families have a lot to lose, and therefore have reason to be concerned about getting in trouble with the law.

People living lives marred by trauma and misery are, therefore, less likely to be scared away from drug use by a criminalization policy. They are also more likely to live in underprivileged communities where there are many other people scarred by trauma and misery, and all such people are motivated to use drugs in order to escape from it all (Johnstad, 2022a, 2023d, 2023e). Drug use motivated by a wish to escape is more likely to develop into drug abuse. Communities with many such people naturally have more drug abuse, and this also means that there is a thriving and lucrative illicit drugs market in these communities. People belonging to such communities therefore know very well where they can buy illicit drugs, whereas people living in well-functioning communities (typically more affluent, more educated, more middle class etc.) may not have the same access to the underground drug market. In underprivileged communities with thriving markets for illicit drugs,

criminal gangs fight for control over the cash flow and bring violence to the people living there, which breeds more trauma and misery, which breed more drug abuse (Abadinsky, 2011; Coyne & Hall, 2017; Goldstein, 1985; Jacques & Allen, 2015). People in such communities who develop drug addictions may be forced into desperate acts in order to raise money for drug use, and sometimes commit horrendous crimes that result in trauma not only for the victims but also for the perpetrators. Afterwards, these people need drugs even more strongly than before in order to cope with the resulting perpetrator trauma and to be able to live with themselves (Mohamed, 2015). For some people, therefore, the criminalization regime works a kind of existential trap. Through drug criminalization, our societies effectively set up a social dynamic that seduces underprivileged and vulnerable people into a self-perpetuating cycle of trauma, violence, and escapist drug abuse.

All these factors work together. Each reinforces the others, and the end result is that the drug war produces drug abuse. Decriminalization will not end this dynamic immediately, because the harm already caused by criminalization has been set in motion and will play itself out. People traumatized in childhood by gang violence afflicting their families and friends are probably at risk for drug abuse throughout their lives, even if the drug war is called off and its contribution to future drug abuse is therefore nulled out. People afflicted by perpetrator trauma after betraying their families and friends in a desperate search for drug money will not stop using drugs to cope with such trauma after decriminalization. Decriminalization turns off the production machinery of future drug abuse, but the positive effects may take many years to manifest.

Thus, the criminalization regime probably serves to increase drug abuse. At the same time, it may decrease drug use among well-functioning individuals, at least to a moderate extent, but drug use among such people is unlikely to result in patterns of abuse (Johnstad, 2022a). Being held back from drug use by the criminalization regime is a good indicator of not having major life problems in terms of social misery or deep-seated psychological trauma, because such problems give a strong drive towards escapist drug use as well as a reduced concern about the consequences of drug use. People who have little to lose probably do not care so much about losing it as people who have a lot to lose. There are many other factors – for instance the extent of social support, financial reserves, and opportunities of getting one’s life back on track – that also favor educated, middle class people. Unless one sees moderate drug use as a problem in and of itself, for instance from concern with spiritual harm and religious heterodoxy, the benefits from drug criminalization are either very small or negative, since one of the probable effects of the drug war is to produce the abuse that the policy is nominally intended to reduce.

The costs of non-criminalization are essentially the same as the benefits of criminalization. Decriminalizing drugs may lead to moderate increases in drug use among well-functioning people, especially if the drugs are found to have high utility (e.g., Patrick et al., 2022). Such utility has been reported particularly for psychedelics, MDMA, and cannabis, although stimulants also have a clear claim to utility in that they keep people awake and active, thus enabling people to get work done. (I drink coffee as I write this and find the claim to utility obvious.) Our societies already allow the weak stimulants coffee, tobacco, tea, and chocolate, and some societies allow for betel/areca nut, coca leaf, khat, and other weak stimulants. Without criminalization, some people will probably find uses for stronger stimulants like amphetamines as well. Since stimulant use is potentially habit-forming (I am without a doubt addicted to coffee, although I do not feel this addiction is particularly debilitating or troublesome), a policy of stimulant decriminalization therefore runs the risk of increased stimulant abuse. We should note, however, that amphetamine use remains low in Czechia and Portugal after several decades of decriminalization, although their policy regimes only decriminalize personal use, and therefore do not solve the problems arising from the profitability of the illicit drug market (European Monitoring Centre for Drugs and Drug Addiction [EMCDDA], 2022). The regulated distribution of amphetamines would solve the black-market problem but may also lead to higher use. Opioids such as heroin, fentanyl, and Oxycodone also have high utility especially for people suffering from physical or psychological pain, and this utility corresponds to a high abuse potential. As indicated by the developments in the United States over the past decades, the full and unrestricted legalization of such drugs may appear to be a risky endeavor. The price of abandoning all controls over the distribution of such drugs is therefore high at least in terms of the risk involved. Contrary to what Lawn (1990) maintained, however, the discontinuation of the drug war does not entail an unrestricted legalization that would allow for selling psychoactive substances to children. Instead, the Swiss and Dutch approach of providing free opioids to people suffering addictions to such drugs and otherwise restrict distribution to strictly medical uses is probably the best approach to an opioid policy.

When it comes to the benefits of non-criminalization, we could start by pointing to two related factors. The first is that illicit drug use appears to have many benefits relevant to human flourishing for people who manage to keep their use at moderate levels of frequency, which most drug users are able to do (Anthony et al., 1994; Lopez-Quintero et al., 2011; Schlag, 2020). The second is that the use of drugs proscribed under United Nations conventions have long traditions of use in many non-western cultures (Guerra-Doce, 2015; Hultkrantz, 1997; Labate & Cavnar, 2014, 2016; Maroukis, 2012), and non-criminalization would discontinue the suppression of such cultural practices. Ending the drug war, therefore, would mean that people who use psychedelics or other drugs in spiritual contexts will no longer be persecuted for their religious practices, as article 18 of the *Universal declaration of human rights* might seem to demand. Furthermore, it would mean abandoning the racial and cultural biases inherent to the banning of less harmful drug use (cannabis, psychedelics) common among non-white peoples while allowing more harmful drug use (alcohol, tobacco) common among white people. A decriminalization policy that allows for the regulated manufacture and distribution of currently illicit drugs would also allow for better quality control, thus reducing the harms of drug use.

Finally, the costs of criminalization include the development of a highly profitable illicit drugs market supercharging criminal gangs into powerful societal problems (e.g., Goldstein, 1985; Jacques & Allen, 2015). These gangs wage war on one another in neverending struggles for market domination, leaving civilians in the crossfire. Violent struggles between gangs and law enforcement personnel have much the same effect. Because of their wealth, these gangs are also well positioned to bribe government officials, engaging in complex patron-client relations and alliances that penetrate deep into the state bureaucracy (United Nations High Commissioner on Human Rights Working Group on Arbitrary Detention, 2021). Endemic violence and corruption, especially in the Global South, lead to trauma and misery for the general population, leaving many at risk for drug abuse. Legitimizing the drug war from the virtue perspective means that the overall analysis of the costs and benefits must be positive, and it seems very difficult to argue that a slight reduction in drug prevalence compensates for the immense violence and destructiveness entailed by the prohibition regime, especially since the violence very likely leads to trauma and misery that increase drug abuse over the long term.

3.3 In the final analysis

Modern drug prohibition started out as a 17th-century campaign by the Inquisition to suppress religious psychedelics use in the Americas (Johnstad, 2022b, 2023b). Church authorities regarded the

religious experiences such drug use appeared to lead to as either a communion with demons or as evidence of madness (Campos, 2012; Chuchiak, 2012; Dierksmeier, 2020). A few centuries later, both Christian missionaries, colonial authorities, and various authorities especially in China and the Arab world worried about the societal and economic consequences of cannabis and opium use, which were gradually prohibited (Duvall, 2015, 2019). Investigations into the harmful effects of these drugs tended to conclude that the worries especially with regard to cannabis use were quite exaggerated, but this did not stem the tide of prohibition (Indian Hemp Drugs Commission, 1895; La Guardia Committee Report, 1944; National Commission on Marijuana and Drug Abuse, 1972).

Why were medical and other authorities at the time convinced that cannabis was such a harmful drug that it was necessary to suppress its use? Undoubtedly many had witnessed or heard reports that cannabis users sometimes ended up in patterns of heavy abuse and were not functioning well. Of course, the same was true for some alcohol users, but Europeans had long experience with alcohol and knew that while alcohol harms some people, many others use it in moderation without being harmed in any obvious way. Today, we know with a high degree of certainty that cannabis is the less harmful of the two (Bonomo et al., 2019; Nutt et al., 2010; van Amsterdam et al., 2015), but people in the 19th and early 20th centuries did not have access to sophisticated means of objective harms assessments via statistical analysis. Instead, they had to rely on less dependable means of knowledge production (often “knowledge” production) that allowed for a much higher extent of bias.

Throughout the colonial era, white Europeans commonly regarded themselves as racially and culturally superior to people who were neither white nor European. There was a high extent of prejudice against non-white people, and such prejudice was often explicit in their characterizations of the use of drugs that were unfamiliar to the European tradition. Even when it was not explicit, such prejudice – often based on an overlapping trifecta of race, culture, and social class – affected the white European assessment of the harmfulness of drugs used by non-white people. During the 20th century, the systemically racist United States became the primus motor behind the international regime of drug control, and when a racist country prohibits the cultural practices of its ethnoracial minorities such legislation must obviously be understood in a context of racism.

That the drugs covered in the United Nations drug control conventions were often subject to biased harms assessments do not imply that these drugs are harmless. People who live miserable lives tend to escape into substance abuse, and over time such abuse tends to exacerbate their misery. Drugs like cannabis and alcohol are not black or white in terms of their harm potential but situated rather in a diffuse gray zone between the two. Comparing their harm potential is not necessarily straightforward, because one drug may be more harmful in one regard and the other in a different

regard. Tobacco kills a large number of its users, but usually only after a long period of heavy chronic use, whereas alcohol might kill people while they are intoxicated because they get into unnecessary fights or decide to operate motor vehicles. One important issue which still seems to confound drug harms researchers is the fact that different drugs are prevalent in different user populations, and an association between the use of a given drug and various bodily and mental harms can therefore not be straightforwardly interpreted in the sense that the drug use caused the harm (Johnstad, 2022a, 2023e). To take one example, people who were sexually abused as children are later at greatly elevated risk both for drug abuse and for mental health disorders (Al Mamun et al., 2007; Bebbington et al., 2011; Cutajar et al., 2010; Faraone et al., 2021; Halpern et al., 2018; Schäfer & Fisher, 2011). In the short term, a temporary escape into drug use may afford these people with a pause from their childhood traumas, even as repeated drug-fueled escapes probably exacerbate their disorders over the long term. Ignoring their background and seeing only the co-morbidity of their drug abuse and mental health disorder is a mistake.

The harmfulness of illicit drug use is still exaggerated to a considerable extent. One explanation for this unfortunate tendency is that there is a long tradition in the medical establishment for seeing such drug use as being very harmful, and people entering the profession are socialized into this tradition. Traditions are norm-defining, and it is not easy to calibrate for the fact that the early harms assessments were conducted at a time of profound ethnoracial prejudice that would tend to bias conclusions. Indeed, given these circumstances, it is almost astounding that official harms assessments including the 1895 Indian Hemp Drugs Commission in British India, the 1925 Panama Canal Zone Governor's Committee, and the 1944 La Guardia Committee Report in New York seem largely free of ethnoracial bias, at least in terms of their overall conclusions. Despite these reports, however, a consensus seemed to form among medical professionals that cannabis was very harmful both to its users and to the innocent bystanders who risked being attacked by these users.

Besides tradition, other explanations for the continued exaggerations might include political factors and matters related to financial interests. Furthermore, researchers may sometimes feel that it is safer to err on the side of caution, acting perhaps from an understanding that the main effect from the overdramatization of negative health consequences is only to scare some people away from drug experimentation. Given that the drugs usually subject to such exaggerations happen to be those favored historically by Asians, Africans, Arabs, and indigenous Americans, however, and that there is clearly a tradition of ethnoracial prejudice at play here, exaggerated claims of drug harms are not as innocent as some may believe.

Exaggerated drug harms become especially problematic when they are used to support a regime of drug criminalization whose negative consequences are in turn immense yet largely overlooked. I have previously pointed to a correspondence between exaggerated harms and disregarded benefits, but the same clearly applies to the axis of harms resulting from drug use itself and harms resulting from the drug war. The latter include homicides and other forms of violence on an almost unimaginable scale not least in Latin America, but while the news media sometimes report this explosion in violence, they rarely discuss its underlying reason (Johnstad, 2023c). To a large extent, such violence is a consequence of the war on drugs and can be ended by ending that war.

When we also consider that the drug war has only a minor impact on the prevalence of drug use while the violence it causes seems very likely to result in escapist drug abuse, it is clear that the harms exaggerations that support the criminalization regime are anything but innocent. As a policy, the war on drugs serves to protect law-abiding citizens from harms that are not generally worse than those incurred by alcohol use and which most such people would be entirely capable of navigating safely on their own, at the same time as it inflicts immense harm especially on underprivileged people in the Global South.

We have seen in the above that the arguments that have been used to defend the drug war invariably fell apart when they were scrutinized in a comprehensive analysis based not on untested assumptions about drug harms and other issues but on proper reviews of the relevant scientific literature and explicit analyses of effects and consequences. On a utilitarian level, neither harm-based or prevalence-based arguments succeed as defenses of the criminalization regime, because this regime seems largely ineffectual in curbing drug use and results in far worse harms than those caused by drug use itself. This does not imply that drug use is harmless and that all drugs should be sold alongside coffee and tea in supermarkets, but it does imply that heavy-handed prohibition is not a successful policy.

Some people are skeptical of utilitarian approaches to complex societal issues, but on a level of criminalization policy it would seem irrational to maintain a regime that does not function well in utilitarian terms. From the opposite direction, one might object to a policy that is successful in utilitarian terms for instance on a basis that it infringes on civil rights or other worthy principles, but an attempt to defend a regime of criminal punishment without a basis in utilitarian efficacy would

seem difficult. Criminalizing a given behavior has extensive costs both in human and in economic terms, and it is not reasonable to invest societal resources in a policy regime that fails to reduce the prevalence of the criminalized behavior while incurring substantial unintended negative consequences.

Beyond the utilitarian level, furthermore, the principles of liberty, sovereignty, and human rights favor policies that allow adult citizens to make their own choices. While the chronic abuse of addictive and debilitating drugs such as heroin and alcohol clearly reduces people's ability to function as free and sovereign citizens, the attempt to force people to be free by restricting their freedom to be unfree is fundamentally suspect. Mill acknowledged an exception for selling oneself into slavery, but illicit drug use is not like selling oneself into slavery. In terms of its harmfulness, the moderate use of an illicit drug is very much like having a few beers, while the heavy chronic use of such a drug is much like heavy chronic alcohol use. Many illicit drugs are less addictive than alcohol, and none are more addictive than tobacco. Furthermore, while a ban on selling oneself into slavery would probably work quite well in utilitarian terms, the ban on drug use entails a range of negative societal consequences that produce the conditions that make people turn to escapist drug abuse.

The attempt to carve out an exception from the principles of liberty, sovereignty, and human rights for illicit drugs is invariably based on the notion that these drugs are so harmful and addictive that they would seduce and destroy a large part of our citizenry. As we have seen, however, this notion of extreme harmfulness is simply not true, and the idea that legalization would entail widespread drug abuse fails to understand the real nature of drug abuse. The people who are at risk for such abuse are predominantly those who suffer from major life issues related to psychological trauma and social misery, and they end up in patterns of abuse because they are desperate for repeated relief from their wretched situation. If a person is desperate enough to use intoxicants frequently despite the obvious and well-known risks, they are also desperate enough to risk getting in trouble with the law. These are the kinds of people who will tend to use drugs whether or not they are legally available, and legalization will therefore not add many such desperate people to the population of drug users because they already used drugs prior to legalization. Instead, drug legalization will add some new users who are curious about drug effects but who were not willing to face the risks of illicit drug use, and this group of careful people are not at high risk for drug abuse.

The final irony of the war on drugs is thus that it leads to violent crime, which in turn leads to psychological trauma and social misery, which in turn leads to escapist drug abuse. The violence this war imposes especially on the Global South is on an almost unimaginable scale, and I believe this unintended but foreseeable consequence is the responsibility of those who maintain and support the

criminalization regime. Although the policy makers who defend the drug war do not intend or wish for large-scale murder, torture, and other crimes, that is nevertheless the harvest they reap from their criminalization policy. I believe they, and the citizens who support them especially by voting for them, are implicated in the gross violations of the human right to life and security that the war on drugs entail (Johnstad, 2023c).

From a perspective that sees human beings as an end unto themselves, and which does not allow for calculations about causing harm to some people to reduce harm to others, the endemic violence resulting from the drug war is plainly unforgiveable no matter what its putative upside might be. From a more utilitarian perspective that may be willing to engage in such calculations, the pain caused to the victims of drug war violence could, in principle, be compensated for by the pain spared somewhere else: but all evidence indicates that the drug war succeeds only in reducing drug prevalence to a very slight extent. Compared to the harm it causes, this is nothing; and to add insult to injury, the trauma and misery caused by the drug war leaves people at risk for future drug abuse. Not a single criminalization theory can justify drug criminalization, and both the Kantian and Millian theories appear to actively speak against it. Drug criminalization is unethical.

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